(20)

No. 05-1284
Title: Lisa Watson, et al., Petitioners
v.
Philip Morris Companies, Inc., et al.
Docketed: April 10, 2006
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (04-1225)
Decision Date: August 25, 2005
Rehearing Denied: November 18, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 6 2006	Application (05A725) to extend the time to file a petition for a writ of certiorari from February 16, 2006 to March 18, 2006, submitted to Justice Alito.
Feb 9 2006	Application (05A725) granted by Justice Alito extending the time to file until March 20, 2006.
Mar 10 2006	Application (05A725) to extend further the time from March 20, 2006 to April 17, 2006, submitted to Justice Alito.
Mar 14 2006	Application (05A725) granted by Justice Alito extending the time to file until April 17, 2006.
Apr 7 2006	Petition for a writ of certiorari filed. (Response due May 10, 2006)
Apr 21 2006	Brief of respondents Philip Morris Companies, Inc., et al. in opposition filed.
May 1 2006	Brief amicus curiae of Public Citizen, Inc. filed. (Distributed)
May 2 2006	DISTRIBUTED for Conference of May 18, 2006.
May 2 2006	Reply of petitioners Lisa Watson, et al. filed. (Distributed)
May 22 2006	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Dec 15 2006	Brief amicus curiae of United States filed.
Dec 19 2006	Supplemental brief of respondents Philip Morris Companies, Inc., et al. filed.
Dec 27 2006	DISTRIBUTED for Conference of January 12, 2007.
Dec 27 2006	Supplemental brief of petitioners Lisa Watson, et al. filed. (Distributed)
Jan 12 2007	Petition GRANTED.
Feb 5 2007	SET FOR ARGUMENT ON Wednesday, April 25, 2007.
Feb 21 2007	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for the respondent.
Feb 22 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Feb 23 2007	Joint appendix filed.
Feb 23 2007	Brief of petitioners Lisa Watson, et al. filed.
Feb 26 2007	Brief amicus curiae of Blue Cross and Blue Shield Association in support of neither party filed.
Feb 26 2007	Brief amici curiae of Public Citizen, Inc., et al. filed.
Feb 26 2007	Brief amici curiae of Public Justice, P.C., et al. filed.
Feb 26 2007	Brief amici curiae of Defense Contractors and Industry Associates filed.

Feb 26 2007	Brief amicus curiae of United States filed.
Feb 26 2007	Brief amici curiae of Illinois, et al. filed.
Feb 26 2007	Brief amici curiae of Campaign for Tobacco-Free Kids, et al. filed.
Feb 27 2007	Record received from U.S.D.C. for Eastern District of Arkansas. (1 box)
Mar 1 2007	Record received from U.S.C.A. for the Eighth Circuit. (1 envelope)
Mar 2 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 2 2007	Record received from U.S.D.C. for Eastern District of Arkansas. (Oral Argument on Motion to Remand) (Volumne)
Mar 16 2007	CIRCULATED.
Mar 30 2007	Brief of respondents Philip Morris Companies, Inc., et al. filed. (Distributed)
Mar 30 2007	Brief amici curiae of Former Commissioners and Senior Staff of the Federal Trade Commission filed.
Mar 30 2007	Brief amicus curiae of Washington Legal Foundation filed. (Distributed)
Apr 13 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 18 2007	Reply of petitioners Lisa Watson, et al. filed. (Distributed)

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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a private actor doing no more than complying with federal regulation is a "person acting under a federal officer" for the purpose of 28 U.S.C. § 1442(a)(1), entitling the actor to remove to federal court a civil action brought in state court under state law.

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Petitioners Lisa Watson and Loretta Lawson, individually and on behalf of all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

INTRODUCTION

This case presents issues of exceptional importance to the balance of judicial authority between the state and federal judicial systems. Before the court of appeals, defendant Philip Morris argued that this case – a class action brought under Arkansas law related to Philip Morris's marketing and promotion of light cigarettes – "is exactly the type of case for which the federal officer removal statute was created." Appellee's Br. 34. The Eighth Circuit agreed with that extraordinary proposition, holding that Philip Morris was a "person acting under" a federal officer. 28 U.S.C. § 1442(a)(1). The court held that Philip Morris had a right to defend this action in federal rather than state court, simply because Philip Morris was subject to comprehensive and detailed regulation by the Federal Trade Commission ("FTC") in marketing and promoting its light cigarettes. That holding is at odds with this Court's precedents, conflicts with the text and purpose of the statute, defies common sense, and furthers already profound confusion in the federal courts as to the proper interpretation of the statute.

The Eighth Circuit's decision is not an aberration, but rather reflects a pervasive confusion in the federal courts concerning the proper interpretation of the federal officer removal statute in cases involving private parties. The courts of appeals have articulated markedly differing tests for when a private actor is "acting under" a federal officer within the meaning of the statute. The First, Seventh, and Eleventh Circuits, for example, have embraced an official function approach that looks to whether a private actor is standing in the shoes of a federal officer in enforcing federal law. Under the law of those circuits, Philip Morris unquestionably does not qualify as a person

"acting under" a federal officer and is thereby not entitled to remove an action to federal court. The Eighth Circuit followed the Fifth Circuit, however, in making dispositive the comprehensiveness and detail of federal control over the activities of a private actor. And, in the Ninth and Tenth Circuits, a private actor must show only that it is under the general supervision of a federal officer. The current articulation of "acting under" in four circuits, therefore, differs markedly from the official function test adopted by three circuits.

This Court's review is urgently needed to bring clarity to the test for determining if and when a private actor is "acting under" a federal officer for purposes of federal officer removal. Left uncorrected, the Eighth Circuit's approach to interpreting § 1442(a)(1) will have significant consequences. By radically expanding the category of cases in which removal is appropriate, the Eighth Circuit's rule threatens the established interest of States in having state courts be the primary forums for the adjudication of state law. The Eighth Circuit's rule will invite regulated parties of all types to remove cases from state court, based on no more than artful characterizations of the regulatory regime to which the party is subject. Channeling ordinary state lawsuits to federal courts in this manner will drastically stretch federal judicial resources and undermine the interests of States in having their judicial systems available to vindicate the interests of their citizens.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-19a) is reported at 420 F.3d 852. The district court's opinion denying petitioners' motion to remand (Pet. App. 20a-60a) is unreported (but available at 2003 WL 23272484).

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2005. A petition for rehearing was denied on November 18, 2005. *See* Pet. App. 61a. On February 9,

2006, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 20, 2006, and on March 14, 2006, further extended the time within which to file a petition to and including April 17, 2006. *See id.* at 100a-101a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutes are set forth at Pet. App. 98a-99a.

STATEMENT OF THE CASE

A. The Federal Officer Removal Statute

The federal officer removal statute, 28 U.S.C. § 1442(a), governs the removal to federal court of criminal and civil actions in which federal officers and agencies are defendants. The statute provides that "[a] civil action . . . commenced in a State court . . . may," in certain circumstances, "be removed . . . to the district court of the United States for the district and division embracing the place wherein it is pending." 28 U.S.C. § 1442(a). The first subsection of § 1442(a) defines one such circumstance as when "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, [is] sued in an official or individual capacity for any act under color of such office." *Id.* § 1442(a)(1). By providing federal officers with the statutory right to remove a civil action based on state law, § 1442(a)(1) functions as an exception to the well-pleaded complaint rule. *See generally Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

"The federal officer removal statute has had a long history." *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). The first federal officer removal statute was enacted during the War of 1812. *See* Richard H. Fallon, Jr., *et al.*, *Hart & Wechsler's The Federal Courts and the Federal System* 951 (4th ed. 1996) ("Hart & Wechsler"). The provision "was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular."

Willingham, 395 U.S. at 405. To that end, the statute provided for the removal of actions brought in state court against "any collector, naval officer, surveyor, inspector, or any another officer . . . or any other person aiding or assisting" in enforcing the customs provisions of the act. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198. By its terms, the removal provision expired at the end of the war. *See Willingham*, 395 U.S. at 405.

The next iteration of a federal officer removal statute came in the Force Act of 1833, enacted in response to South Carolina's threat of nullification. *See* Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633-34. *See generally* Hart & Wechsler at 951. The removal provision of that Act authorized the removal of suits against federal officers or "other person[s]" on account of acts done in enforcing the customs laws. § 3, 4 Stat. 633.

Congress enacted a new series of federal officer removal statutes during the Civil War, authorizing the removal of cases brought against federal officers for acts committed during the rebellion and justified under the authority of the President or Congress. *See* Hart & Wechsler at 951. These provisions "were eventually codified into a permanent statute which applied mainly to cases growing out of enforcement of the revenue laws." *Willingham*, 395 U.S. at 405-06. The permanent removal statute was amended several times prior to 1948, at which time the statute was broadened, as a part of the Judicial Code of 1948, to include *all* federal officers. *Id.* at 406.

In 1996, Congress amended § 1442(a)(1) to include federal agencies within the compass of the removal provision. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850.

B. FTC "Regulation" of Light Cigarettes

In the 1950s, the FTC became alarmed about the accuracy of representations made in cigarette advertising about the tar and nicotine content of cigarettes. The FTC published guidelines "advising manufacturers to make no

representations about the tar and nicotine content of a cigarette that could not be supported with reliable scientific evidence." *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985).

In 1967, the FTC sought to standardize tar and nicotine testing by endorsing a method to test the tar and nicotine levels of cigarettes known as the Cambridge Filter Method. *See id.*; *see also Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11,178 (1967). The Cambridge Filter Method was intended to provide a means for making factual statements in advertising about tar and nicotine content of cigarettes. In August 1970, the FTC sought comment on a formal agency rule that would have made it "an unfair or deceptive act or practice . . . to fail to disclose, clearly and prominently, in all advertising the tar and nicotine content [of the cigarettes] . . . based on the most recently published" data resulting from tests using the Cambridge Filter Method. *Advertising of Cigarettes*, 35 Fed. Reg. 12,671, 12,671 (1970).

Later that year, however, five leading cigarette companies, including Philip Morris, agreed to a "voluntary program" by which the companies would disclose tar and nicotine data culled from FTC test results on advertising, although cigarette companies have never entered into any such agreement regarding labeling on packages or cartons. *See* Federal Trade Commission, *Report to Congress*, App. C (Dec. 31, 1970). Upon reviewing the voluntary agreement, the FTC suspended its proposed rulemaking indefinitely. *Brown & Williamson Tobacco Corp.*, 778 F.2d at 37.

C. Proceedings in State and District Court

This case arises out of a civil action brought against Philip Morris by Lisa Watson and Loretta Lawson in Arkansas state court for violations of Arkansas state law. Petitioners, acting on behalf of a class of all persons who purchased two brands of so-called "light" cigarettes – *viz.*, Marlboro Lights and Cambridge Lights – in Arkansas, have alleged that Philip Morris engaged in unfair and

deceptive business practices in connection with promoting and marketing its light cigarettes.

Specifically, petitioners' complaint alleges that Philip Morris, "[w]hile marketing and promoting decreased tar and nicotine deliveries, . . . designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the [Cambridge Filter Method] . . . than would be delivered to the consumers of the product." Pet. App. 63a-64a (¶ 9). Petitioners have averred that Philip Morris falsely represented its cigarettes as light or low tar by "[i]ntentionally manipulating the design and content" of its cigarettes to lower artificially the results of the testing method used to measure tar and nicotine levels. *See id.* at 64a-65a (¶¶ 12-13). Based on those allegations, petitioners seek relief under the Arkansas Deceptive Trade Practices Act (Counts I and II).

Philip Morris removed petitioners' action to the United States District Court for the Eastern District of Arkansas, relying on, among other provisions, the federal officer removal statute. Philip Morris argued that removal of a "private party [is appropriate] where it is sued for actions taken under the direction of a federal officer." *Id.* at 76a. Philip Morris insisted that "[t]he 60-year history of FTC mandates" caused Philip Morris to be a federal officer or a "person acting under" a federal officer. *Id.* at 88a.

Philip Morris argued further that it had a "colorable federal defense" because petitioners' claims "inevitably conflict with the FTC's policy judgments, giving rise to a valid preemption defense." *Id.* at 90a-91a. Philip Morris also maintained a causal connection existed between FTC regulation and the challenged acts because petitioners sought to impose liability "for conduct . . . that was undertaken at the express direction" of the FTC. *Id.* at 92a.

Petitioners moved to remand the case to Arkansas state court, challenging Philip Morris's entitlement to avail itself of § 1442(a)(1). Petitioners argued that they were not challenging the use of FTC testing procedures "but rather the company's deceptive practices in labeling its products

as low tar and nicotine . . . accomplished by manipulation of the [FTC] testing procedures." Appellants' Br. xii (citing Motion for Remand ¶¶ 4-5). Furthermore, petitioners maintained that Philip Morris's marketing of light cigarettes subject to FTC regulation did not make the company a "person acting under" a federal officer. *Id.*

On December 12, 2003, the district court denied petitioners' motion to remand. The court held that "[t]he 'person acting under' element and the causal nexus element tend to converge into a single issue: whether the actions that form the basis of the state suit were performed pursuant to comprehensive and detailed federal government regulation." Pet. App. 36a. After surveying the landscape of federal cases passing on the subject, the court then held that, because FTC "regulation of cigarette testing and advertising spans over forty years and is detailed and specific," "Philip Morris acted under the direction of a federal officer within the meaning of § 1442(a)(1) when it cited the tar and nicotine values derived from the FTC Method in its [cigarette] advertisements." *Id.* at 41a.

Recognizing that its decision expanded the scope of § 1442(a)(1) and created a split in the federal courts, the district court certified the question for interlocutory review under 28 U.S.C. § 1292(b). *See id.* at 57a-60a.

D. The Court of Appeals' Decision

The Eighth Circuit affirmed the district court's denial of petitioners' motion to remand. The court of appeals opined that it was obliged not to give § 1442(a)(1) a "'narrow' or 'limited' interpretation." Pet. App. 4a. The court then held that Philip Morris qualified as a "person acting under" a federal officer, even though it noted that that decision was contrary to that of "every other district court confronted with tobacco companies alleging they were acting under a federal officer." *Id.* at 6a. In holding that Philip Morris *was* entitled to invoke § 1442(a)(1), the Eighth Circuit articulated a test that looked to whether the FTC exercised "comprehensive, detailed regulation" over Philip Morris. *See id.* at 8a; *see also id.* at 6a

(whether "acting under" condition is satisfied depends on "detail and specificity of the federal direction of the defendant's activities"). Relying primarily upon analogy to the Fifth Circuit's decision in *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 398 (5th Cir. 1998), the Eighth Circuit held the FTC did exercise "comprehensive, detailed regulation" over Philip Morris, and thereby satisfied the "acting under" condition. Pet. App. 7a-8a.

Furthermore, the court deemed it irrelevant that the FTC "regulations" that Philip Morris claimed rendered it a federal officer were never adopted and that the industry acted by voluntary agreement. The court decided that "[t]he FTC effectively used its coercive power to cause the tobacco companies to enter the agreement." *Id.* at 10a.

The Eighth Circuit also held that a causal connection existed between Philip Morris's challenged conduct and the acts regulated by the FTC. The court explained that petitioners' complaint both "directly implicates the enforcement and wisdom of the FTC's tobacco policies" and "challenge[s] the FTC's policy judgment that despite the failure of the Cambridge Filter Method . . . the test results should still be included in advertising." *Id.* at 15a-16a.

In addition, the Eighth Circuit decided that, although petitioners' claims were entirely under Arkansas state law, Philip Morris had a colorable federal defense of preemption that supported its claim to removal under the federal officer removal statute. *Id.* at 16a-18a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision that Philip Morris may remove to federal court further divides the courts of appeals on the important jurisdictional issue of when a private actor is "acting under" a federal officer such that the party may avail itself of the federal officer removal statute. The First, Seventh, and Eleventh Circuits have each adopted a framework for interpreting the "acting under" requirement that looks to whether a private actor is performing an official governmental function; under that

framework, removal jurisdiction for Philip Morris would have been improper. The Eighth Circuit, however, followed an approach similar to that of the Fifth Circuit in making dispositive the detail or comprehensiveness of federal control. By contrast, the Ninth and Tenth Circuits have each held that general supervision by a federal officer may be sufficient to support removal jurisdiction.

This Court's review is needed to give clarity to an important jurisdictional provision aimed at maintaining a proper division between state and federal judicial authority when federal officers are sued in state court. Absent correction by this Court, the Eighth Circuit's decision encourages private regulated actors of all types to assert an immunity from suit in state court for alleged violations of state law based on nothing more than that the party is subject to comprehensive and detailed federal regulation.

THE EIGHTH CIRCUIT'S DECISION DIVIDES THE FEDERAL COURTS ON SIGNIFICANT ISSUES PERTAINING TO THE PROPER APPLICATION OF THE FEDERAL OFFICER REMOVAL STATUTE

A. Federal Courts Are Divided Or Otherwise In Disarray With Respect To When A Private Party Is "Acting Under" A Federal Officer Within The Meaning Of § 1442(a)(1)

The courts of appeals are deeply divided over the legal test for determining when a private party is "acting under" a federal officer.[1] Although the "acting under" clause

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[1] Ordinarily, a division among the courts of appeals signals most plainly the need for this Court's intervention. Although that is also true here, we also highlight the deep confusion among the district courts because an order granting or denying a motion to remand to state court is not reviewable on interlocutory appeal. *See* 28 U.S.C. § 1447(d) ("order remanding a case to the State court from which it was removed is not reviewable on appeal"); *Angelides v. Baylor College of Medicine*, 117 F.3d 833 (5th Cir. 1997) (no jurisdiction under § 1447(d) or collateral order doctrine to review remand order); *Krangel v. General Dynamics Corp.*, 968 F.2d 914, 915 (9th Cir. 1992) (per curiam) (declining to make exception to § 1447(d) for "orders deciding important legal issues for the first time"); *In re Diet Drugs Prods. Liab. Litig.*, 93 Fed.

serves a crucial function in differentiating private parties from federal actors, courts of appeals' decisions interpreting the clause run the gamut from those holding that a private party availing itself of the statute must be carrying out official governmental functions, to those requiring comprehensive and detailed federal control over the removing party, to those looking only to whether the federal government exercises *any* control, broadly defined. Philip Morris made a similar point before the Eighth Circuit, arguing that "[c]ourts have articulated different legal tests to describe the level of federal direction necessary to bring a defendant within the 'acting under' provision of the federal officer removal statute." Appellee's Br. 35.[2]

1. The First, Seventh, and Eleventh Circuits have adopted an official function test

In *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989), the First Circuit upheld removal by a telephone company sued for its alleged involvement in electronic surveillance by federal agents. *See id.* at 486. The plaintiffs specifically alleged that the

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Appx. 345, 348 (3d Cir. 2004) (court of appeals lacked appellate jurisdiction, under 28 U.S.C. § 1291, to entertain appeal from denial of motion to remand; jurisdiction was not proper under collateral order doctrine). Many cases, therefore, that would further demonstrate the divergent approaches of the courts simply do not reach the courts of appeals for lack of appellate jurisdiction. Petitioners accordingly look both to the federal courts of appeals and to the federal district courts – the forums in which, as a practical matter, this important jurisdictional issue is often ultimately resolved – to demonstrate the urgency of action by the Court.

[2] *See also McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1196 (M.D. Fla. 2006) (observing that "there are varying formulations of the test for removal under the federal officer provision"); *Lalonde v. Delta Field Erection*, No. Civ. A. 96-3244-B-M3, 1998 WL 34301466, at *2 (M.D. La. Aug. 6, 1998) ("Neither the Supreme Court nor the Fifth Circuit have established what is required to show that a government contractor is 'acting under' an officer of the United States or of an agency thereof. Cases from other federal district courts . . . vary in their approach to what is required under this element.").

telephone company "wiretapped and/or offered technical assistance to federal agents to wiretap." *Id.* Without a word as to whether federal control over the telephone company was comprehensive or detailed – the factors deemed dispositive by the Eighth Circuit – the First Circuit there held that the defendant's "involvement in the electronic surveillance" – which was "official government business" – "was strictly and solely at federal behest." *Id.*[3] Thus, the First Circuit's approach makes the official or private character of the performed acts determinative of whether the private actor is "acting under" the federal officer for removal purposes.

In *Venezia v. Robinson*, 16 F.3d 209 (7th Cir. 1994), the Seventh Circuit adopted a comparable approach – looking to whether the removing party was acting in an official capacity in enforcing federal law – in deciding whether a state officer was entitled to removal under § 1442(a)(1). In that case, a civil suit was brought against an officer of the Illinois Liquor Control Commission in connection with a seizure of video gaming machines. The state officer sought removal on the ground that he was acting as a part of an FBI investigation and thus was a "'person acting under' a federal agent." *Id.* at 211. The court of appeals agreed, reasoning that "[a] federal agent or informant who asserts that he was (or is) acting *in the course of a criminal investigation* is entitled to remove under § 1442(a)(1), presenting to the federal tribunal all questions of justification and immunity." *Id.* at 212 (emphasis added).[4]

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[3] *Cf. Maine Ass'n of Interdependent Neighborhoods v. Commissioner, Maine Dep't of Human Servs.*, 876 F.2d 1051, 1054 (1st Cir. 1989) (Breyer, J.) (commissioner of state agency "might be considered a 'person acting under' the Secretary [of Health and Human Services]" insofar as state agency is "*administering* the AFDC rules and regulations") (emphasis added).

[4] The Seventh Circuit's decision has been viewed by a district court outside that circuit as supporting the notion that private parties performing official governmental functions may be entitled to be treated

The Eleventh Circuit followed a similar path in *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996). There, the court of appeals upheld a refusal to remand to state court a state-law action for negligent inspection and wrongful certification of an aircraft engine. The Eleventh Circuit, consistent with the First and Seventh Circuits, found that the defendant, an "authorized agent of the [Federal Aviation Administration ("FAA")]," was entitled to removal because there was a connection between the defendant's acts "under asserted official authority" and the civil action brought against him. *Id.* at 1427-28 (internal quotation marks omitted). The Eleventh Circuit deemed it crucial that the defendant had acted "in his capacity as an agent of the FAA" with respect to all claims alleged against him in the complaint. *Id.* at 1428.[5] Underscoring the divide in the circuits, the Eleventh Circuit did not feature the issue of whether the federal government exercised comprehensive and detailed control with respect to engine inspections, but instead focused upon whether the defendant was performing the official delegated functions of the federal government. *See id.* (noting that defendant was "acting on behalf of the FAA, under the authority granted to him by the FAA").

Relatedly, federal district courts have applied variations of the official function test, holding that the conduct of a private party invoking § 1442(a)(1) must be tantamount to official governmental conduct, and that this test is not satisfied by showing merely that the private actor complied with the law. In *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530 (W.D. Ky. 1996), for example, the court denied removal to a defendant testify-

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as federal officers. *See Reiser v. Fitzmaurice*, No. 94 Civ. 7512, 1996 WL 54326, at *4-*5 (S.D.N.Y. Feb. 8, 1996).

[5] *But cf. Lovell Mfg. v. Export-Import Bank of the United States*, 843 F.2d 725, 734 n.13 (3d Cir. 1988) ("it is not at all clear that a mere agency-principal relationship between [a government agency] and [a private corporation] would be sufficient to support jurisdiction" under § 1442(a)(1)).

ing pursuant to a subpoena, reasoning that he was not acting under a federal officer because he "ha[d] not been directed to perform *official functions* as an officer or agent of the government." *Id.* at 533 (emphasis added). Contrary to the framework employed by the Eighth Circuit, the court explained that testifying before a grand jury is "something private citizens are regularly required to do" and "such testimony does not make a citizen a federal official or agent." *Id.*[6]

In short, under the official function approach taken by the First, Seventh, and Eleventh Circuits, Philip Morris – a private corporation doing no more than complying with federal law – would not have been entitled to removal.

2. The approach of the Eighth and Fifth Circuits rests on the comprehensiveness and detail of federal control

The Eighth Circuit's framework tracks an approach taken by the Fifth Circuit in making the comprehensive-

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[6] *See also Freiberg v. Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1150 (D. Colo. 2002) ("Because [§ 1442(a)(1)] is premised on the protection of *federal* activity and an anachronistic mistrust of state courts' ability to protect and enforce *federal* interests and immunities from suit, private actors seeking to benefit from its provisions bear a special burden of establishing the official nature of their activities."); *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (bank was not "acting under" federal officer based on federal regulation because removal is permitted only "when the corporation is so intimately involved with government functions as to occupy essentially the position of an employee of the government"); *Kaplansky v. Associated YM-YWHA's of Greater New York, Inc.*, No. 88 CV 1292, 1989 WL 29938, at *3 (E.D.N.Y. Mar. 27, 1989) (parties complying with subpoena were not "acting under" federal officer because defendants were not "asked to stand in the shoes of [federal] officers or agents and perform 'official' functions"); *Northern Colorado Water Conservancy Dist. v. Board of County Comm'rs*, 482 F. Supp. 1115, 1118 (D. Colo. 1980) (county and regional council were not "acting under" federal officer in participating in Clean Water Act program because, although "the federal clean water program provides for the use of various agencies of state and local government in pursuing environmental goals, it does not constitute a grant of substantive powers to political subdivisions of another sovereign").

ness and detail of control exercised by a federal officer both necessary and sufficient to permit removal by a private party under § 1442(a)(1).

In *Winters*, the Fifth Circuit invoked the principle that § 1442(a)(1) should be interpreted liberally, and held that a chemical manufacturer sued for harm allegedly caused by Agent Orange was entitled to remove a case because of the federal government's "strict control" and "on-going supervision" of the Agent Orange production process, as well as its "detailed and direct orders . . . to supply a certain product." 149 F.3d at 398-400 (internal quotation marks omitted); *see also Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 417-18 (5th Cir. 2001) (reading *Winters* as applying a "strict control" test). Numerous federal district courts in a variety of other circuits have followed the Fifth Circuit or applied similar control tests, none of which asks whether a private party is performing an official function in enforcing federal law, as does the test of the First, Seventh, and Eleventh Circuits.[7]

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[7] *See, e.g., Parks v. Guidant Corp.*, 402 F. Supp. 2d 964, 967 (N.D. Ind. 2005) (removing party must show conduct is "linked to detailed and specific regulations"); *Kaye v. Southwest Airlines Co.*, No. Civ. A. 3:05CV0450-D, 2005 WL 2074327, at *4 (N.D. Tex. Aug. 29, 2005) (Southwest Airlines not entitled to remove claims relating to failure to refund passenger charge because, "[a]lthough [the regulations] demonstrate that Southwest was compelled to take certain actions concerning" the charge, Southwest did not establish, under *Winters*, "the *detailed* control necessary for a private party to avail itself of removal"); *Edwards v. Blue Cross/Blue Shield of Texas*, No. Civ. 3:05CV0144-H, 2005 WL 1240577, at *4 (N.D. Tex. May 25, 2005) ("acting under" test not satisfied because company did not take challenged acts "pursuant to the direct and detailed control of an officer of the United States"); *Kennedy v. Health Options, Inc.*, 329 F. Supp. 2d 1314, 1318 (S.D. Fla. 2004) (contractual relationship "does not in itself constitute the direct and detailed control that is required to assert federal jurisdiction"); *In re Wireless Telephone Radio Frequency Emissions Prods. Liab. Litig.*, 327 F. Supp. 2d 554, 562-63 (D. Md. 2004) (applying "direct and detailed" federal control test); *In re 'Agent Orange' Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 447 (E.D.N.Y. 2004) ("acting under" clause is satisfied by showing "substantial degree of direct and detailed federal control"); *Haller v. Kaiser Found. Health Plan of the Northwest*, 184 F. Supp. 2d

Moreover, a court in the Second Circuit applying a comprehensive and detailed control test has allowed federal officer removal on the basis of regulated corporations' compliance with federal environmental regulations. That ruling suggests the unbounded nature of a test based only upon the comprehensiveness and detail of federal control. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 342 F. Supp. 2d 147, 156 (S.D.N.Y. 2004) (defendants had "sufficiently alleged that they added MTBE to gasoline at the direction of the [Environmental Protection Agency ("EPA")], a federal agency, thereby meeting the ["acting under"] requirement of removal pursuant to section 1442(a)(1)"), *clarified on other grounds*, 341 F. Supp. 2d 386 (S.D.N.Y. 2004).[8]

1040, 1044 (D. Or. 2001) (private individuals may be "acting under" federal officer when the officer has "direct and detailed control over the defendant") (internal quotation marks omitted); *Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344, 346-47 (S.D. Miss. 1994) (generalized rules not sufficient to establish direct and detailed control); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572-73 (N.D. Cal. 1992) ("acting under" clause satisfied because Navy monitored contract performance "at all times" and exercised "direct and detailed" control over contractor) (internal quotation marks omitted).

[8] Even district courts applying a variation of the comprehensive and detailed control test have found, in similar circumstances, that Philip Morris is not entitled to removal. *See Paldrmic v. Altria Corporate Servs., Inc.*, 327 F. Supp. 2d 959, 966 (E.D. Wis. 2004) ("acting under" clause is satisfied when a defendant establishes "direct and detailed control," but that standard was not satisfied because Philip Morris was sued "primarily" for "the manner in which it designed and manufactured light cigarettes, which actions were not taken pursuant to FTC direction"); *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 845, 846 (N.D. W. Va. 2004) (although private actor can claim protection of § 1442(a)(1) when "it is threatened with liability for actions taken on behalf of a federal officer," FTC did not require Philip Morris to employ testing method or to "disseminate misleading information"); *Pearson v. Philip Morris USA, Inc.*, No. 03-CV-178-HA, 2003 U.S. Dist. LEXIS 24508, at *11-*12 (D. Or. Aug. 8, 2003) (following *Tremblay*); *Tremblay v. Philip Morris, Inc.*, 231 F. Supp. 2d 411, 419 (D.N.H. 2002) (removal inappropriate because plaintiffs did not "challenge the enforcement or wisdom of any FTC policy, procedure or regulation" but rather the "conduct of a private corporation, acting without direction from a

3. The Ninth and Tenth Circuits construe the "acting under" clause to permit removal if the federal officer had general supervision over a private actor

Differing from the comprehensive and detailed control test adopted by the Eighth and Fifth Circuits and contrary to the official function test embraced by the First, Seventh, and Eleventh Circuits, the Ninth and Tenth Circuits have construed the "acting under" clause more broadly, requiring only that a federal officer have had general supervision over the defendant.

In *California v. H&H Ship Service Co.*, No. 94-10182, 1995 WL 619293 (9th Cir. Oct. 17, 1995) (judgment noted at 68 F.3d 481), the Ninth Circuit held that companies cleaning up a hazardous waste spill under the auspices of a remediation plan approved by the Coast Guard were "acting under" a federal officer. Specifically, the defendants argued that removal was appropriate because "their actions were taken as part of a removal action *supervised* by the United States Coast Guard." *Id.* at *1 (emphasis added). Although noting that the question was "difficult," the Ninth Circuit reasoned that the defendants were acting under a federal officer because the Coast Guard had a general "on-scene command over the removal" of the hazardous waste and "the defendants were present at the site in order to execute a removal that was under the direction and control of a federal officer." *Id.* at *1-*2. Notably, the court analyzed neither the comprehensiveness nor the detail of the Coast Guard's on-scene command or

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federal officer or agency"); *see also City of Livingston v. Dow Chem. Co.*, No. C05-03262-JSW, 2005 WL 2463916, at *3 (N.D. Cal. Oct. 5, 2005) (Dow Chemical *not* entitled to removal because "merely being subject to federal regulations, even if extensive, is insufficient to demonstrate that a private litigant acted under the direction of a federal officer") (internal quotation marks omitted). By contrast, the District Court for the Southern District of Illinois, expressly following the reasoning of *Watson*, permitted Philip Morris to remove. *See Kelly v. Martin & Bayley, Inc.*, No. 05-CV-0409-DRH, 2006 WL 44183, at *3-*4 (S.D. Ill. Jan. 9, 2006). The Seventh Circuit has accepted interlocutory review of that issue. *See* Order, *In re Kelly*, No. 06-8007 (7th Cir. Mar. 6, 2006).

control. Nor did it assess whether the private actors were performing an official governmental function. Federal district courts have sometimes taken a broad analytic approach.[9]

Similarly, the Tenth Circuit, in *Greene v. Citigroup Inc.*, No. 99-1030, 2000 WL 647190 (10th Cir. May 19, 2000) (judgment noted at 215 F.3d 1336), held that a private company was "acting under" a federal officer in engaging in the remediation of a hazardous waste site. In so holding, the court of appeals, without assessing the comprehensiveness or detail of federal control or whether the remediation was an official governmental function, explained only that the company "implemented a remedy selected by the EPA, pursuant to CERCLA, and it was subject to civil penalties for failure to comply with that directive." *Id.* at *2.

In sum, there is deep confusion in and a mature split among the courts of appeals with respect to the proper interpretation of the "acting under" clause. That confusion is consequential. The phrase distinguishes private parties from government officials, and thus acts as a key limitation of the jurisdictional statute. But, owing to a dizzying array of doctrinal formulations, the outcome of a removal decision pertaining to a private regulated actor will depend upon the circuit – or even the district – in which removal is sought. In order to bring consistency and clarity to this important area of jurisdictional law, this Court should grant certiorari.[10]

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[9] *See Crocker v. Borden, Inc.*, 852 F. Supp. 1322, 1326 (E.D. La. 1994) ("acting under" test was met merely because private corporation was "acting under the direction of the Navy in the construction of the marine turbines"); *Pack v. AC & S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993) ("acting under" requirement satisfied by "direct control," which is "established by showing strong government intervention and the possibility that a defendant will be sued in state court as a result of the federal control").

[10] Adding to the doctrinal confusion, the Fifth Circuit, as well as numerous district courts, has merged the "acting under" and "under

B. In Holding That Philip Morris May Avail Itself Of The Federal Officer Removal Statute, The Eighth Circuit Misinterpreted This Court's Precedents, Reaching An Outcome Inconsistent With Statutory Text And Purpose

By permitting Philip Morris to remove under the federal officer removal statute, the Eighth Circuit departed from any reasonable interpretation of § 1442(a)(1) and this Court's precedents.

1. The Eighth Circuit embraced an interpretation of "acting under" that does not accord with the statutory text viewed in light of this Court's precedents

a. The Eighth Circuit fundamentally erred in holding that the "acting under" clause was satisfied merely by showing that "the acts . . . were performed pursuant . . . to comprehensive and detailed regulations." Pet. App. 6a (internal quotation marks omitted, first ellipsis in original). The Eighth Circuit's test – which has never been endorsed by this Court – is inconsistent with § 1442(a)(1)'s text.

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color of such office" inquiries under § 1442(a)(1). *See Winters*, 149 F.3d at 398 (without undertaking independent "acting under" analysis, asking whether "government specified the composition of Agent Orange so as to supply the causal nexus between the federal officer's directions and the plaintiff's claims"); *New Jersey Dep't of Envtl. Protection v. Exxon Mobil Corp.*, 381 F. Supp. 2d 398, 404 (D.N.J. 2005) ("To establish that it was 'acting under' an officer of the United States, Defendant must show a causal nexus between the conduct charged . . . and the acts performed by Defendant at the direction of official federal authority."); *Freiberg*, 245 F. Supp. 2d at 1149 (private party may remove "as long as the private actor asserts a colorable federal defense" and "demonstrates a sufficient causal nexus between what it has done under asserted official authority and the acts giving rise to the state claims"); *Good v. Armstrong World Indus., Inc.*, 914 F. Supp. 1125, 1128 (E.D. Pa. 1996) ("The 'acting under' language in the statute forces [the defendant] to show a causal nexus between the plaintiff's claims and the conduct taken pursuant to direction from a federal officer."); *Akin v. Big Three Indus., Inc.*, 851 F. Supp. 819, 823 (E.D. Tex. 1994) (treating "acting under" limitation as a causation requirement).

The wording of § 1442(a)(1) gives good reason to believe that regulation of a private corporation, however comprehensive or detailed, cannot support removal by a private party. The statute states that a removing defendant must be sued in "an official or individual capacity for any act under color of such office," bespeaking Congress's expectation that a defendant will have been acting in an official capacity – that is, that the private actor was functionally standing in the shoes of a federal officer in carrying out the challenged acts. *Cf. Jefferson County v. Acker*, 527 U.S. 423 (1999) ("under color of office" requirement demands showing "a causal connection between the charged conduct and asserted *official authority*") (internal quotation marks omitted, emphasis added). The language adjoining the "acting under" clause thus strongly supports a reading of the clause that excludes a private actor, such as Philip Morris, that has not carried out an official governmental function. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (under "doctrine of *noscitur a sociis*," a "word is known by the company it keeps"); *Neal v. Clark*, 95 U.S. 704, 708 (1878) ("It is a familiar rule in the interpretation of . . . statutes that a passage will be best interpreted by reference to that which precedes and follows it.") (internal quotation marks omitted).

This Court's decision in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), underscores that textual point. In that case, the Court decided whether private parties could avail themselves of the civil rights removal provision of 28 U.S.C. § 1443(2), which authorizes removal for "any act under color of authority derived from any law providing for equal rights." In resolving that question, the Court looked to a predecessor statute of § 1443(2), which limited removal to "officer[s]" or "other person[s]." 384 U.S. at 816. The Court concluded that the "other person" clause protected only "officers and agents" of the Freedmen's Bureau charged with enforcing the Civil Rights Act of 1866. *Id.* at 816-17. The Court explained that those agents derived their authority from the Freedmen's

Bureau legislation and were entitled to removal, if not as officers, then "based upon their enforcement activities under the Freedmen's Bureau legislation and the Civil Rights Act." *Id.* at 818. Although interpreting § 1443(2), the Court held that the "other person" clause of that provision tracked the "acting under" clause of a predecessor to § 1442(a)(1). *Id.* at 820 n.17, 823 n.20; *see also id.* at 820 n.17 ("The limitation of 28 U.S.C. § 1443(2) to official enforcement activity . . . draws support from analogous provisions in the removal statutes available to federal revenue officers.").

Thus, *Peacock* supports the proposition that the "acting under" clause of § 1442(a)(1) should encompass only "federal officers or agents and those authorized to act with or for them in affirmatively executing duties under . . . federal law." *Id.* at 824. The Eighth Circuit's framework – which looks to whether a private party is subject to comprehensive and detailed control – is inconsistent with that teaching, as it confuses those private parties authorized to *enforce* federal law (such as a private party imbued with authority to enforce the Civil Rights Act) with those that *comply* with federal law (such as Philip Morris in marketing light cigarettes).

b. The court below also erred in thinking that it should give a "broad" interpretation to the "acting under" clause. Ordinarily, statutes affording removal jurisdiction are strictly construed, a corollary of the principle that federal courts are courts of limited jurisdiction. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). The court of appeals rested on this Court's decision in *Willingham*, however, to interpret the statute broadly in deciding that Philip Morris was "acting under" a federal officer. *See* Pet. App. 4a-5a.

The Eighth Circuit's reliance on *Willingham* was entirely misplaced. In *Willingham*, this Court rejected the view that doubt as to whether a federal officer could claim official immunity rendered removal improper, explaining that, "[a]t the very least," the statute "is broad enough to

cover all cases where *federal officers* can raise a colorable defense arising out of their *duty to enforce federal law*." 395 U.S. at 406 (emphases added). Properly construed, the upshot of *Willingham* is that the removal by a federal officer sued based on the performance of official duties should not be frustrated by a narrow interpretation of § 1442(a)(1). That principle has no bearing in a context, such as this, where the very question to be answered is whether a defendant stands in the shoes of a federal officer.[11] Indeed, in analogous circumstances in which the scope of the statute has been at issue, this Court has adopted narrowing constructions of § 1442(a)(1). *See International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 81-82 (1991) (rejecting defendant agency's broad interpretation of "officer of the United States"); *see also Mesa v. California*, 489 U.S. 121, 132-35 (1989) (removal requires the "averment of a federal defense").

2. The Eighth Circuit's control test is inconsistent with the purpose of § 1442(a)(1)

The distinction between being authorized to enforce federal law and complying with federal law explains why a comprehensive and detailed control test, which treats a private actor doing no more than complying with regulation in engaging in commercial activity as a federal officer, is flatly inconsistent with the purpose of § 1442(a)(1). This Court has frequently looked to the history and purpose of the statute in resolving interpretive disputes about the statute's scope. *See Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981); *Willingham*, 395 U.S. at 405-06; *Gay v. Ruff*, 292 U.S. 25, 32-33 (1934); *Colorado v. Symes*, 286 U.S. 510, 517-19 (1932). The purpose, this Court has said, "is not hard to discern." *Willingham*, 395 U.S. at

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[11] *See Freiberg*, 245 F. Supp. 2d at 1152 n.6 ("Given the purpose of § 1442 and its basis in a mistrust of states and state courts to protect federal interests, [the statute] should be read expansively only when the immunity of individual federal officials, and not government contractors, is at issue.").

406. The statute rests on the premise that "the Federal Government 'can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, . . . the operations of the general government may at any time be arrested at the will of one of its members.'" *Id.* (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1880)).[12] Expanding the federal officer removal statute to encompass a private corporation doing business in compliance with federal regulation does not honor that purpose.[13]

Furthermore, because Philip Morris is complying with rather than enforcing federal law in marketing light cigarettes, Philip Morris faces no plausible risk that state court animus against the enforcement of federal law – a key historical rationale for removal – will be directed against it. *See Manypenny*, 451 U.S. at 241-42 ("Historically, removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties. The act of removal permits a trial upon the merits of the state-law question free from local interests or prejudice.") (footnote omitted); *Ruff*, 292 U.S. at 32 (Force Act removal provision was designed to

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[12] *See Willingham*, 395 U.S. at 406 (federal officer removal statute rests upon "very basic interest in the enforcement of federal law through federal officials"); *see also* Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3727, at 125 (3d ed. 1998) (§ 1442 authorized removal by those "who are acting in the course of their employment *by or on behalf of* the United States") (emphasis added); *Symes*, 286 U.S. at 517 (federal officer removal statutes were enacted to "safeguard[] officers and others acting under federal authority against peril of punishment for violation of state law . . . by reason of opposing policy on the part of those exerting or controlling state power").

[13] *See United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) ("The specific advertisements which the Government claims were intentionally misleading . . . were certainly not mandated by the FTC.").

quell South Carolina's threat of nullification by "protect[ing] those engaged in the enforcement of the federal revenue law from attack by means of prosecutions and suits in a state court for violation of state law").

Nor does the Eighth Circuit's comprehensive and detailed control test find support in other, secondary, purposes of § 1442(a)(1). This Court has explained, for example, that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court." *Willingham*, 395 U.S. at 407; *see also International Primate Protection League*, 500 U.S. at 86-87 (one justification for § 1442(a)(1) is that federal officers need protection of a federal forum "because of the manipulable complexities involved in determining [federal officers'] immunity"). The Eighth Circuit, however, made no mention of that purpose, which weighs heavily against an interpretation of § 1442(a)(1) that includes a private actor, such as Philip Morris, with no claim whatsoever to official immunity.[14]

3. The federal government's suit against Philip Morris for acts similar to those at issue here underscores the consequence of the distinction between private actors and federal officers

One of the great paradoxes of the Eighth Circuit's ruling is that the federal government is currently locked in a lengthy legal dispute with several tobacco companies, including Philip Morris, over their non-compliance with federal law. Indeed, the very acts that Philip Morris alleges were required by the federal government to qualify it for "federal officer" removal purposes are the very same acts that the federal government alleges constituted a RICO conspiracy in which Philip Morris, and other conspirators,

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[14] *See Richardson v. McKnight*, 521 U.S. 399, 404-10 (1997) (privately employed prison guards of for-profit corporation running state correctional center not entitled to qualified immunity because "[h]istory does *not* reveal a 'firmly rooted' tradition of immunity" for prison guards and immunity would not serve purposes of the doctrine).

"did the exact opposite of what the Government and public health community called for" and "fraudulently exploited the FTC test method to target and benefit financially by deceiving smokers." Post-Trial Br. of the United States of America at 70-71, *United States v. Philip Morris USA Inc.*, No. 99-CV-02496 (D.D.C. filed Aug. 24, 2005). In fact, the federal government itself has taken the position that the Eighth Circuit's decision in this case was in grave error by pointing out that "[e]very other court to consider Philip Morris's claim for removal under [§ 1442(a)(1)] has rejected it." Reply Mem. in Support of the Post-Trial Br. of the United States of America at 28 n.31, *United States v. Philip Morris USA Inc.*, No. 99-CV-02496 (D.D.C. filed Sept. 19, 2005) ("U.S. Reply Mem.") (discussing *Watson*).

The government's suit against Philip Morris therefore brings into high relief the common sense difference between a private commercial actor allegedly complying with regulation and a federal officer performing official duties, a difference that the Eighth Circuit's approach to federal officer removal entirely elides.

4. The Eighth Circuit's approach conflates ordinary preemption analysis with the justification for federal officer removal

Underlying the Eighth Circuit's badly mistaken decision is the court's apparent confusion between the requisites for preemption of state law and the standards and justifications for federal officer removal. The court of appeals explained, for example, that "[w]hether Philip Morris's labeling of cigarettes as 'lights' is deceptive directly implicates the enforcement and wisdom of the FTC's tobacco policies." Pet. App. 15a. But it is the law of preemption, not federal officer removal, that safeguards federal interests in carrying out regulatory objectives vis-à-vis regulated parties. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (reconciling, under preemption principles, various state common law damage actions with federal regulation of cigarettes). A necessary premise of

the Eighth Circuit's holding, therefore, is that Congress, through § 1442(a)(1), decided that state courts are not competent to hear preemption defenses raised by private regulated parties.

This Court has squarely rejected that premise in two ways. First, "a case may *not* be removed to federal court on the basis of a federal defense, *including the defense of pre-emption*, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (second emphasis added). And, second, "when a state proceeding presents a . . . pre-emption issue, the proper course is to seek resolution of that issue by the state court," as state courts are "presumed competent to resolve federal issues." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988).

In sum, the Eighth Circuit erred in adopting a framework in which "[t]he applicability of [the federal officer] removal statute depend[ed] in large part on the role the FTC plays in regulating the tobacco industry." Pet. App. 2a. By asking a fundamentally misguided question, the Eighth Circuit arrived, predictably, at the wrong answer – a result incompatible with this Court's precedents and out of keeping with any reasonable rendition of § 1442(a)(1). A private regulated corporation doing no more than abiding by federal regulation cannot avail itself of the protection of the federal officer removal statute.

C. This Case Presents An Excellent Vehicle To Resolve The Issues Presented

This case is a particularly suitable vehicle for this Court to bring needed clarity to the law of federal officer removal. The district court certified the issue of whether Philip Morris was entitled to federal officer removal pursuant to 28 U.S.C. § 1292(b), finding that its ruling "involve[d] a controlling question of law" and that there was a "substantial ground for difference of opinion" on that issue. *See* Pet. App. 57a; *see also id.* at 58a ("The facts

surrounding the FTC's involvement with cigarette testing and advertising are not in dispute. This question is purely a legal one."). The legal errors committed by the Eighth Circuit pertained to important jurisdictional issues that are wholly separate from the merits of petitioners' claims and that can be resolved as questions of law. Furthermore, it is common ground that Philip Morris is an entirely private corporation and that Philip Morris was not performing an official governmental function in abiding by FTC regulations. And Philip Morris has acknowledged that "[t]he facts relating to the history of the FTC's regulation . . . are not in dispute." Appellee's Br. 8. This Court will accordingly have the opportunity to fashion a framework for federal officer removal unhampered by an incomplete record or by equivocal or disputed facts.

The interlocutory character of the court of appeals' decision does not at all weigh against this Court's review. Where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern, *et al.*, *Supreme Court Practice* 259 (8th ed. 2002). As we set forth above, those conditions are unarguably satisfied in this case. Indeed, this Court has granted certiorari in order to review similar decisions certified under 28 U.S.C. § 1292(b) on many recent occasions. *See, e.g.*, *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005); *Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004).

D. The Eighth Circuit's Decision Raises Jurisdictional Issues Of Exceptional Importance

Because § 1442(a)(1) regulates an exceptionally important intersection of the interest of States in the enforcement of their own laws in their own forums and the interest of the federal government in the supremacy of federal law, this Court has long recognized the importance of maintaining legal clarity in the test for federal officer removal. *See Symes*, 286 U.S. at 518 (federal officer

removal statute reflects important "equality" of interests of States and federal government). Indeed, issues pertaining to the removal statute, this Court has said, are "of great importance, bringing . . . into consideration the relation of the general government to the government of the States." *Davis*, 100 U.S. at 260; *see also id.* at 273 (Clifford, J., dissenting) ("[q]uestions of greater importance than those certified . . . could hardly be presented for discussion"); *Manypenny*, 451 U.S. at 239 (certiorari was granted to resolve issue of jurisdiction arising from § 1442(a)(1) "[b]ecause it is an issue that carries significance for federal-state relations").

In other contexts, this Court has zealously protected States' interest in enforcing both state and federal law in state courts. *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (state courts have concurrent jurisdiction over civil RICO claims because under "system of dual sovereignty . . . state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States"). The need for such protection is even greater in this type of case, in which a statutory removal provision is used to wrest an action based on state law from state court. *See Shamrock Oil*, 313 U.S. at 109 ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined.") (internal quotation marks omitted).

The Eighth Circuit's reasoning will, predictably, invite regulated entities of all types to assert that they, too, have a statutory right not to be sued under state law in state court. In concurrence, Judge Gruender, recognizing the expansiveness of the Eighth Circuit's framework, attempted to restrict the holding, suggesting that, because the FTC's regulation of Philip Morris was "extraordinary," the decision should not be "an invitation to every participant in a heavily regulated industry to claim that it . . . acts at the direction of a federal officer merely because it

tests or markets it products in accord with federal regulation." Pet. App. 18a. Judge Gruender's effort at damage limitation, however, is deeply flawed. It rests on a mistaken appraisal of FTC regulation and misunderstands the comprehensiveness and detail of other federal regulatory regimes.[15]

FTC regulation of light cigarettes is anything but extraordinary. It is undisputed that the FTC has regulated neither the design nor the manufacturing of light cigarettes. Nor has the FTC required that tobacco companies advertise their cigarettes as "light" or "low tar." In fact, the FTC has never even defined those significant terms. *See* Notice, *Cigarette Testing; Request for Public Comment*, 62 Fed. Reg. 48,158, 48,163 (1997) (observing that there are no "official definitions" for cigarette descriptors such as "low tar" and "light"). Indeed, this Court has expressly recognized statutory limitations on the FTC's regulatory authority over cigarettes. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 149-50 (2000). It is thus hardly surprising that the federal government submitted evidence in its suit against Philip Morris squarely "reject[ing] [Philip Morris's] claim that the FTC has given special focus to cigarette advertising." U.S. Reply Mem. at 29.[16]

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[15] In addition to being a party "acting under" a federal officer, a removing party must also be sued for an "act under color of such office." 28 U.S.C. § 1442(a)(1). Under *Willingham*, however, the "under color of office" limitation is satisfied merely by an allegation that the party was acting in an official capacity in performing the charged conduct. *See* 395 U.S. at 409. Thus, once a private actor is judged to be acting under a federal officer by the Eighth Circuit's control test, it will be easy to maintain that the challenged acts were under color of office. It is therefore imperative that this Court provide guidance on the proper interpretation of the "acting under" clause.

[16] The majority opinion also found it significant that the FTC's "actually conduct[ing] the testing [of cigarettes] itself for over twenty years, instead of delegating that task to the industry, was outside the government's normal course of conduct." Pet. App. 13a. But the court of appeals offered no explanation – and none is apparent – for why that fact is at all relevant to judging whether governmental regulation is

Indeed, federal regulation in other regulatory contexts is *at least* as comprehensive and detailed as is the FTC's regulation of light cigarettes.[17] The National Highway Traffic Safety Administration ("NHTSA"), for example, has long broadly regulated automobile safety measures, including mandating detailed specifications for crash tests. *See Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1253-57 (D.C. Cir. 2004) (detailing NHTSA regulation of automobile airbag regulations, including testing procedures); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 874-81 (2000) (describing history of federal regulation of passive restraints). Federal regulation of other consumer products, such as pesticides, medical devices and drugs, and recreational boats, is similarly expansive and detailed. *See, e.g., Bates v. Dow AgroSciences LLC*, 125 S. Ct. 1788, 1794-97 (2005) (detailing broad federal regulation of pesticide labeling, packaging, and

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comprehensive or detailed. Thus, it offers no logical basis, under the court's own test, upon which to distinguish between regulation by the FTC and regulation by other federal agencies.

[17] *See Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 966 (9th Cir. 2005) ("[Office of the Comptroller of the Currency] regulations [of national bank subsidiaries] establish a comprehensive and finely calibrated scheme for the creation of operating subsidiaries."); *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 369 (4th Cir. 2005) (Secretary of Labor has "promulgated comprehensive regulations" of employers under Family and Medical Leave Act of 1993); *Chapman v. Lab One*, 390 F.3d 620, 624 (8th Cir. 2004) ("Congress specifically required the Secretary of Transportation to develop comprehensive regulations regarding controlled substance testing and laboratory procedures" for mandatory drug testing in railroad industry); *Waymire v. Norfolk & Western Ry. Co.*, 218 F.3d 773, 775 (7th Cir. 2000) (Secretary of Transportation is authorized "to implement comprehensive and detailed railroad safety regulations"); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 369 (3d Cir. 1999) ("[T]he Administrator of the FAA has implemented a comprehensive system of rules and regulations, which promotes flight safety by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules.") (footnotes omitted); *Swirsky v. National Ass'n of Sec. Dealers*, 124 F.3d 59, 61 (1st Cir. 1997) ("The Securities Exchange Act of 1934 and its subsequent amendments create a detailed, comprehensive system of federal regulation of the securities industry.").

distribution); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 476-80 (1996) (describing comprehensive federal regulation of distribution of medical devices); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56-59 (2002) (detailing comprehensive federal regulation of recreational boats). Yet, in each of those latter circumstances, the federal regulation is not so "comprehensive" as to preempt state-law claims, much less to support federal officer removal.

Given that the system of voluntary regulation underlying Philip Morris's claimed entitlement to removal is less formal and certainly no more comprehensive or detailed than many other federal regulatory regimes, there is no reasonable prospect that the damage from the Eighth Circuit's rule can be contained. The wave of removals sure to follow in the wake of the Eighth Circuit's decision thus calls for intervention by this Court. Apart from divesting States of the ability to enforce state laws in their own forums against private companies alleged to have harmed their citizens, a wave of removals will severely, and unnecessarily, tax the resources of the federal judiciary. *Cf. City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941) (federal diversity statute is strictly construed to avoid "offense to state sensitiveness" and to "reliev[e] the federal courts of the overwhelming burden of business that intrinsically belongs to the state courts") (internal quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 7, 2006

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1225

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION, AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Defendants-Appellees.

[Submitted Nov. 15, 2004]

[Filed Aug. 25, 2005]

Before RILEY, JOHN R. GIBSON, and GRUENDER, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Lisa Watson and Loretta Lawson filed this interlocutory appeal, on their own behalf and as representatives of a class, from the district court's[1] denial of their motion to remand to state court. Watson and Lawson filed their class action in Arkansas state court, alleging that Philip Morris violated the Arkansas Deceptive Trade Practices Act. *See* Ark.Code Ann. § 4-88-107 *et seq*. We hold that the case was properly removed to federal court.

Watson and Lawson claim that Philip Morris engaged in "unfair business practices and/or deceptive and unlawful conduct in connection with the manufacture, distribu-

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[1] The Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas.

tion, promotion, marketing, and sale of Cambridge Lights and Marlboro Lights." They basically allege that Philip Morris designed its cigarettes to deliver more tar and nicotine to smokers than its use of the labels "lights" and "lowered tar and nicotine" in its advertising would suggest. The propriety of remand is the only issue before us, as it was in the district court, and we express no views on the merits.

Philip Morris removed the action pursuant to 28 U.S.C. § 1442(a)(1) (2000), which permits removal where a person is sued for actions taken under the direction of a federal officer. Philip Morris claims it satisfies the requirements of the federal officer statute because it was acting under the direct control of the Federal Trade Commission (FTC) when it engaged in the allegedly unlawful conduct. The district court denied Watson's and Lawson's motion to remand and certified the following question for interlocutory appeal under 28 U.S.C. § 1292(b): "May Philip Morris remove this lawsuit to federal court under 28 U.S.C. § 1442(a)?" Slip op. at 36. We affirm the district court's answer of "yes" to that question.

The applicability of this removal statute depends in large part on the role the FTC plays in regulating the tobacco industry.[2]

The Federal Trade Commission Act authorizes the FTC to regulate "unfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 45(a)(2) (2000), which includes regulation of unfair and deceptive tobacco advertisements. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 513, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (FTC has "long regulated unfair and deceptive advertising practices in the cigarette industry").

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[2] *See Federal Trade Comm'n v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37-38 (D.C.Cir.1985), for a comprehensive history of the FTC's involvement in regulating unfair and deceptive advertising in the tobacco industry.

In the 1950s, the FTC's policy changed from permitting some claims of "low" or "lower" tar and nicotine levels to prohibiting all such representations in advertising. The FTC wanted a uniform rating system so that consumers could compare tar and nicotine levels among brands. The FTC developed the Cambridge Filter Method, which uses a smoking machine that takes a two-second puff on a cigarette every sixty seconds until the cigarette is smoked to a specified length. *Brown & Williamson*, 778 F.2d at 37. The machine collects tar and nicotine on filter pads to be measured. Since its first formal testing in 1967, the FTC has been reporting the Cambridge Filter Method results in the Federal Register. From its initial development, the FTC was aware that the testing method did not measure the amount of tar or nicotine that an individual smoker may receive. The purpose of the test was not to replicate human smoking but to provide a basis for comparison.

When the FTC proposed a trade regulation rule in 1970 that would require advertisements to disclose tar and nicotine ratings, as determined by the Cambridge Filter Method, several leading tobacco companies responded by entering into an agreement to disclose the Cambridge Filter Method results in all cigarette advertising. The FTC accepted the agreement, which was conditioned on suspension of the formal rulemaking proceedings. Letter from Eight Tobacco Companies to FTC (Dec. 17, 1970) ("Letter Agreement").

After twenty years of testing, the FTC decided to terminate its cigarette testing lab, and instead require the cigarette industry to self-test, using the Cambridge Filter Method, and to submit results that would continue to be published in the Federal Register. The FTC retained the right to conduct unannounced inspections of the industry testing facilities and the right to confirm the test results through a government lab.

Based upon the FTC's involvement in the tobacco industry, the district court denied Watson's and Lawson's mo-

tion to remand to state court. Our review of that denial is de novo. *See Nichols v. Harbor Venture, Inc.*, 284 F.3d 857, 860 (8th Cir.2002).

Section 1442(a)(1) permits removal by the following:

> (1) The United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(emphasis added). Section 1442(a) requires that a defendant: (1) act under the direction of a federal officer; (2) show a nexus or "causal connection" between the alleged conduct and the official authority; (3) have a colorable federal defense; and (4) be a "person" within the meaning of the statute. *See, e.g., Jefferson County v. Acker*, 527 U.S. 423, 431, 119 S.Ct. 2069, 144 L.Ed.2d 408 (1999) (requiring a "colorable federal defense" to a suit for "a[n] act under color of office" and "a 'causal connection' between the charged conduct and asserted official authority"); *Mesa v. California*, 489 U.S. 121, 125, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989) (recognizing the 1442(a) requirement of "'person[s] acting under' an officer of the United States or any agency thereof" sued "for act[s] under color of such office"); *United States v. Todd*, 245 F.3d 691, 693 (8th Cir.2001) (requiring "a 'colorable defense arising out of [the defendant's] duty to enforce federal law'"); *Paldrmic v. Altria Corp. Servs., Inc.*, 327 F.Supp.2d 959, 964 (E.D.Wis.2004) (incorporating all four requirements). Watson and Lawson dispute only the first and second requirements.

In *Willingham v. Morgan*, 395 U.S. 402, 406-07, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969), the Supreme Court explained why the federal officer removal statute was not meant to be given a "narrow" or "limited" interpretation:

> One of the primary purposes of the removal statute – as its history clearly demonstrates-was to have such defenses litigated in the federal courts. . . . In cases like this one, Congress has decided that federal offices, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).

The primary purpose of giving the protection of a federal forum under this statute has a lengthy history. The broad scope of federal officer removal is explained in the early case of *Tennessee v. Davis*, 100 U.S. 257, 263, 25 L.Ed. 648 (1879), where the Court applied the original version of the statute to revenue officers:

> [I]f their protection must be left to the action of the State court, the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

See also Arizona v. Manypenny, 451 U.S. 232, 243, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981) ("Respondent here, by obtaining a federal forum, has fully vindicated the federal policies supporting removal. The plainest evidence of this vindication is the District Court's application of the immunity defense."); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 397-98 (5th Cir.1998). The Supreme Court interpreted the original version of the statute to ex-

clude agencies' removal ability under the statute. *Primate Protection League v. Admin'rs. of Tulane Educ. Fund*, 500 U.S. 72, 87, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991). Congress responded by amending the statute to explicitly permit agency removal. *See* Pub.L. 104-317, § 206(a)(1) (1996). Congress's decision to amend the statute to reverse *Primate* and permit agency removal provides further support for a broad interpretation of the federal officer removal statute.

I.

Whether a defendant is "acting under" the direction of a federal officer depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant.

"[R]emoval by a 'person acting under' a federal officer must be predicated upon-a showing that the acts . . . were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations." *Virden v. Altria Group, Inc.*, 304 F.Supp.2d 832, 844 (N.D.W.Va.2004) (quoting *Ryan v. Dow Chem. Co.*, 781 F.Supp. 934, 947 (E.D.N.Y.1992)). Mere participation in a regulated industry is insufficient to support removal unless the challenged conduct is "closely linked to detailed and specific regulations." *Virden*, 304 F.Supp.2d at 844 (quoting *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 216 F.Supp.2d 474, 500 (D.Md.2002), *rev'd sub nom. on other grounds, Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir.2005)). In contrast to the district court's decision in this case, every other district court confronted with tobacco companies alleging they were acting under a federal officer has remanded the case to state court. *See Virden*, 304 F.Supp.2d 832; *Paldrmic v. Altria Corp. Servs.*, 327 F.Supp.2d 959 (E.D.Wis.2004); *Tremblay v. Philip Morris*, 231 F.Supp.2d 411 (D.N.H.2002).

Although tobacco companies' efforts at federal officer removal have not been successful in other courts, companies contracting with the government have had more success. Courts have found private actors, working under

government contracts, to be acting under the direction of a federal officer where the government maintained control over the manner in which the contractor performed the contracted work or monitored the performance of the work. *Virden*, 304 F.Supp.2d at 845-46.

In a Fifth Circuit government contract case, Diamond Shamrock Chemical Company manufactured herbicide, now known as Agent Orange, for the government. *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 390 (5th Cir.1998). A nurse in Vietnam claimed that exposure to Agent Orange caused her to develop lymphoma. *Id.* Diamond removed the case to federal court and argued that when it manufactured Agent Orange it was acting under the direction of a federal officer. *Id.* at 398. The government specified the formula for Agent Orange, as well as the packaging, labeling and shipping requirements. *Id.* at 399. The government also inspected the labeling of the containers, *id.*; and compelled Diamond to deliver the Agent Orange to it under threat of criminal sanctions, *id.* at 398. In finding Diamond acted under the direction of a federal officer, the court stated:

> We are convinced that the government's detailed specifications concerning the make-up, packaging, and delivery of Agent Orange, the compulsion to provide the product to the government's specifications, and the on-going supervision the government exercised over the formulation, packaging, and delivery of Agent Orange is all quite sufficient to demonstrate that the defendants acted pursuant to federal direction and that a direct causal nexus exists between the defendant's actions taken under color of federal office and Winters's claims.

Id. at 399-400.

The extent of federal direction reached a similar level in *Fung v. Abex Corp.*, 816 F.Supp. 569 (N.D.Cal. 1992). *Fung* involved exposure to asbestos during Abex's construction of submarines pursuant to federal contract. *Id.* at 570-71. The district court found that the government

monitored Abex's performance "at all times" and required it to "construct and repair the vessels" according to the contract specifications. *Id.* at 572-73. In addition, the government retained the right to inspect, test, and approve all contract supplies, and performed its own tests on the submarines to ensure compliance with the contract. *Id.* at 573. The district court found that this level of control and direction satisfied the "acting under" requirement of section 1442(a). *Id.*

Here, the FTC exercises the same type of comprehensive, detailed regulation and does the same kind of ongoing monitoring as in *Winters* and *Fung*. In addition to specifying a testing method that was discussed in detail in two separate submissions to chemists' journals, the FTC modified the testing method to include the following requirements:

> 1. Smoke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 23 mm.,
>
> 2. Base results on a test of 100 cigarettes per brand, or type,
>
> 3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection,"
>
> 4. Determine particulate matter on a "dry" basis . . . to determine the moisture content,
>
> 5. Determine and report the "tar" content after subtracting moisture and alkaloids [(]as nicotine) from particulate matter,
>
> 6. Report tar content to the nearest whole milligram and nicotine content to the nearest 1/10 milligram.

Federal Trade Commission: Testing for Tar and Nicotine Content, 32 Fed.Reg. 11,178 (Aug. 1, 1967). The FTC's specificity in testing procedures is comparable to the specificity of the government's formula for Agent Orange.

Another example of the detail involved in the government's directives to the tobacco industry is the specific

manner in which the industry agreed to disclose the tar and nicotine ratings in advertising:

> The disclosure will be in the following language:
>
> ____mg. "tar", ___mg. nicotine
>
> av. per cigarette, FTC report (date)

Letter Agreement at 2. In *Fung*, the parties' agreement included the design for submarines, and in this case the parties' agreement included the design for testing cigarettes and disclosure of ratings. In *Winters*, the government controlled the delivery and labeling of Agent Orange. Here, the FTC controls the delivery of tar and nicotine information to consumers. The FTC's ongoing monitoring of the cigarette industry far exceeds the monitoring in *Winters*. The government in *Winters* monitored one small aspect of the Agent Orange creation and distribution process – the labeling of the containers. Here, the FTC itself conducted the entire testing process for twenty years and now requires the cigarette manufacturers to conduct the testing to its specifications. The FTC continues to inspect the industry labs, independently verify the results, and publish the ratings. In addition, part of the FTC's ongoing monitoring includes monitoring cigarette ads and occasionally bringing claims against companies for deceptive advertising.

We are satisfied that the level of specificity of the direction is more extensive than that in *Winters*, but the question remains whether the government compels compliance with its directions. In *Winters*, Diamond Shamrock was compelled to supply the Agent Orange to the government. In *Fung*, the defendant acted pursuant to a binding contract that gave the government legal rights to enforce its directions. In this case, Philip Morris acted pursuant to a voluntary industry agreement. Two of the courts confronted with federal officer removal and the tobacco industry have found it significant that the agreement to test and disclose ratings was a "voluntary" agreement, not a formal rule. *See, e.g., Paldrmic*, 327 F.Supp.2d at 966; *Virden*, 304 F.Supp.2d at 841-42.

We are convinced that the record in this case shows a level of compulsion that establishes that Philip Morris was indeed "acting under" the direction of a federal officer. The FTC effectively used its coercive power to cause the tobacco companies to enter the agreement. The FTC made the policy decision to pursue a voluntary agreement instead of proceeding by formal rulemaking. The tobacco industry first proposed an agreement on October 23, 1970, which was just over two months after the FTC announced an intention to make a formal rule requiring disclosure of the Cambridge Filter Method tar and nicotine ratings. This "voluntary agreement" was a substitute for a formal rule. The industry almost certainly would not have proposed the agreement if the FTC had not threatened to make a formal rule. Though the FTC did not act formally, the effect of its actions still compelled the tobacco companies to adhere to a testing and advertising standard that was prompted by the FTC. The FTC agreed with the industry that a voluntary agreement was preferable to the formalities of rulemaking.

FTC Chairperson Miles W. Kirkpatrick explained how an agreement would best serve the goals of the FTC:

> The Commission's objective is to insure that all cigarette advertising make these tar and nicotine disclosures as soon as possible. If the industry can devise a voluntary plan that is feasible and appropriate, the Commission is willing to consider it. A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately.

Press Release, FTC (Oct. 1, 1970).

Daniel Oliver, Chairman of the FTC in 1987, explained that the FTC's practice in advertising regulation was moving more toward agreements and away from rulemaking, which had proved to be inefficient, "little used and not terribly successful." Bringing a single case against one cigarette company would have the effect of bringing the whole industry into compliance and would do so much

more quickly than would a formal rulemaking process. As a result, voluntary agreements have become part of a general trend in administrative law, and the tobacco industry has responded to that trend with cooperation.

Even if the companies had not been compelled to enter the agreement originally, after the companies entered the agreement, the FTC has enforced compliance with the agreement. The FTC's comments suggest it would bring an action for deceptive advertising or reinstitute formal rulemaking proceedings if a company did not disclose the tar and nicotine ratings. Though one could call the agreement voluntary, the reality is that the cigarette companies have included the Cambridge Filter Method results in their cigarette advertising for over thirty years. The main difference between a formal rule and an agreement is that the FTC enforces the disclosure of the Cambridge Filter Method's results by bringing an action against the company for deceptive advertising rather than directly enforcing a regulation.[3] Regardless of the enforcement method, the FTC has compelled the tobacco industry to advertise the tar and nicotine ratings as determined by the Cambridge Filter Method.

The FTC has made it clear it has not found any other testing method adequate and will consider advertising to be "deceptive" if it deviates from the Cambridge Filter Method. In an advisory opinion rejecting one company's offer to advertise a tar level higher than the most recent Cambridge Filter method results, the FTC explained that consumers could be confused if a company were to advertise tar levels that differed from the published Cambridge Filter Method results. *In re Lorillard*, 92 F.T.C. 1035.

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[3] "[W]e cannot force a company to use nor can we approve in advance the kind of testing a company uses. We can make sure that the testing a company uses is an accurate test, especially as that accuracy relates to the FTC method." MacLeod testimony. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 44-45 (D.C.Cir.1985).

(1978). That statement, along with others,[4] sent a clear signal to the tobacco companies that they would risk a deceptive advertising claim if they failed to advertise tar and nicotine levels in accordance with the Cambridge Filter Method.

In comparison, the government contract in *Fung* was not compelled and could be considered a "voluntary agreement" and yet was certainly enforceable once entered. Similarly, in the Agent Orange case, Diamond Shamrock *chose* to participate in the herbicide industry and was already manufacturing herbicide with some of the components of Agent Orange before it was compelled to turn over its Agent Orange to the government. *See Winters*, 149 F.3d at 399. Even a volunteer can be "acting under" a federal officer. In *Oregon v. Cameron*, 290 F.Supp. 36, 37 (D.Or.1968), an unpaid supervisor of a volunteer program and other participants were acting under a federal officer when they entered a farm to help a migrant worker obtain health care. Removal was appropriate because the volunteers were assigned pursuant to federal statute "to work in meeting the health . . . needs of . . . migratory workers and their families." *Id.* at 38. They chose to participate in the program and acted in accordance with the duties they had been assigned, just as Philip Morris has chosen to participate in the cigarette industry and has agreed to follow the FTC's policies.

We have been instructed by the Supreme Court to interpret this removal statute broadly, to give effect to its purpose. *See Colorado v. Symes*, 286 U.S. 510, 517, 52 S.Ct. 635, 76 L.Ed. 1253 (1932); *Willingham v. Morgan*,

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[4] The FTC additionally stated that "the public interest requires that all test results presented to the public be based on a uniform method used by all laboratories" because "[u]se of more than one testing method . . . would only serve to confuse or mislead the public." News Release, FTC (Aug. 1, 1967). It added that "statements or representations based on non-standardized tests having no official or governmental sanction would tend to confuse and mislead the public." Letter from FTC secretary Joseph W. Shea to Howard Bell (Oct. 25, 1967).

395 U.S. 402, 406-07, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969); *see also Winters*, 149 F.3d at 398. In essence, the requirement that the companies enter the agreement was a rule in substance though not in form. If we give the statute a broad and liberal interpretation as we are required to do, the fact that the FTC approved an agreement instead of proposing a rule should not defeat removal under section 1442(a).

The FTC involved itself in the tobacco industry to an unprecedented extent. Throughout the record, there were several indications that both developing a testing method and carrying out the testing evidenced an unusually high level of governmental participation and control. Deputy Director of the Bureau of Consumer Protection of the FTC, C. Lee Peeler, could not recall any other instance where the FTC had gone so far as to specify the testing methodology. To actually conduct the testing itself for over twenty years, instead of delegating that task to the industry, was outside the government's normal course of conduct. The operation of a cigarette lab by the FTC was "really something that was unique" and "unusual for . . . the Commission."

The record is filled with FTC announcements of its policy as well as communications between the FTC and the cigarette industry, which show comprehensive and detailed control. The record establishes that Philip Morris acted under the direction of a federal officer.

II.

For federal officer removal there must be a "causal connection" that links the federal officer's direction and control to the acts challenged in the plaintiff's complaint. It must be shown that "the acts that form the basis for the state civil or criminal suit were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations." *Virden v. Altria Group*, 304 F.Supp.2d 832, 844 (N.D.W.Va.2004) (quoting *Ryan v. Dow Chem. Co.*, 781 F.Supp. 934, 947 (E.D.N.Y.1992)). Here, the acts

regulated by the FTC form the basis for Watson's and Lawson's class action.

The complaint in *Tremblay v. Philip Morris*, 231 F.Supp.2d 411, 418-19 (D.N.H.2002) was drawn more narrowly than Watson's and Lawson's complaint. The court in *Tremblay* held that Philip Morris's actions were not conducted under the direction of a federal officer or agency because the complaint did not challenge the "enforcement or wisdom of any FTC policy, procedure or regulation." *Id.* at 419. Instead, the complaint alleged that Philip Morris manipulated the FTC's policies and exploited the Cambridge Filter Method. *Id.* at 419.

The allegations of the complaint in *Paldrmic* also focused narrowly on the manufacture and design of the cigarettes. "Although the Cambridge System is deeply intertwined with plaintiff's allegations, the gravamen of his lawsuit is that defendant, fully aware that it had agreed to communicate tar and nicotine test results within certain parameters, designed and manufactured its product so as to use the test to mask the truth about its product." 327 F.Supp.2d at 967. The conduct challenged in the complaint was the design or manufacture of cigarettes, and the FTC did not direct Philip Morris how to design and manufacture its product. *Id.*

In this case, Watson and Lawson challenge more than just the cigarette design. They also challenge Philip Morris's "marketing and promoting" of low tar and nicotine cigarettes, its "representations," and its alleged deception of consumers. Thus, in part, their complaint challenges Philip Morris's advertising. It cannot seriously be argued that the FTC does not direct and control the advertising of cigarettes. This Court must look at the FTC's regulation of cigarette advertising because the conduct Watson and Lawson challenge includes cigarette advertising.

Here, Watson and Lawson claim that Philip Morris's use of low tar descriptors such as "lights" or "lowered tar" are deceptive or misleading because the actual tar and nicotine delivered to the smoker is much higher than the

FTC results communicate to smokers. The FTC defines "low tar" as 15.0 mg. or less tar.[5] *FTC Report to Congress, Pursuant to the Federal Cigarette Labeling and Advertising Act* (1979).

In 1971, the FTC and American Brands, Inc. entered into a consent order based upon a complaint the FTC issued. There, the FTC explained its view of how the use of certain descriptors could constitute deceptive advertising – it would be deceptive to use descriptors like "low," "lower," "reduced," or other qualifying terms unless the tar and nicotine levels were also stated. The tar and nicotine levels were to be measured by "the testing method employed by the Federal Trade Commission," which is the Cambridge Filter Method. Watson and Lawson claim it is deceptive for Philip Morris to use a low tar descriptor in conjunction with its cigarette's FTC rating. The very combination Watson and Lawson challenge as deceptive is the same combination the FTC requires to not be deceptive. Whether Philip Morris's labeling of cigarettes as "lights" is deceptive directly implicates the enforcement and wisdom of the FTC's tobacco policies.

It is not as if Watson and Lawson discovered new designs by Philip Morris that the FTC did not contemplate when it required the disclosure of test results. The FTC was well-aware of the limitations of the Cambridge Filter Method. In 1977, the FTC solicited public comment on a problem similar, if not identical to, some of Watson's and Lawson's claims in this case. The FTC studied how the placement of ventilation holes in cigarettes affected their tar and nicotine ratings. If vent holes were covered by the smoking machine's cigarette holder, but open when smoked by a person, then less tar and nicotine would pass through the cigarette to the smoker than the ratings reflected. Conversely, if the smoker covered vents that the

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[5] The FTC recognized that cigarette manufacturers have also used the term "ultra low tar" for cigarettes containing 1.0–5.0 mg. tar, but the FTC has not formally defined that term.

machine's cigarette holder left open, more tar and nicotine would pass through the cigarette to the smoker than the ratings reflected.

The FTC was fully aware that the placement of ventilation holes near the tip of the cigarette complicated the comparability of the tar and nicotine ratings among different brands. The same problem reemerged in the early 1980's when Brown and Williamson developed the Barclay brand, which had ventilation channels instead of ventilation holes. Although the FTC recognized these problems and solicited comment on them, the FTC ultimately chose to continue using the Cambridge Filter Method.

Watson and Lawson challenge the FTC's policy judgment that despite the failure of the Cambridge Filter Method to take into account ventilation holes or channels, the test results should still be included in advertising, even if alongside "light" descriptors, to prevent deception. In contrast, Watson and Lawson claim that this grouping of test results and descriptors renders advertising deceptive. Their claims are sufficiently related to the FTC's direct and comprehensive control to establish a causal connection.

III.

The final two requirements for removal under 28 U.S.C. § 1442(a) are that Philip Morris must present a "colorable federal defense" and that it must be a "person" within the meaning of the statute. To satisfy the requirement of a colorable federal defense, Philip Morris pleaded that Watson's and Lawson's state law claims were preempted by Section Five of the Federal Cigarette Labeling and Advertising Act. Philip Morris's Notice of Removal cites *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) in support of its preemption defense. The district court order stated that Watson and Lawson "do not dispute that the federal preemption defense raised by the Defendants is a 'colorable' claim to a federal defense." Slip op. at 14. The court cited *United States v. Todd*, 245 F.3d 691, 693 (8th Cir.2001), that for a

defense to be colorable it need only be plausible and further stated that it did not believe the district court opinion in *United States v. Philip Morris, Inc.*, 263 F.Supp.2d 72 (D.D.C.2003), prevents the preemption defense from being "colorable." Slip op. at 14 & fn. 5. The district court emphasized that its decision "reaches no conclusion on the merits of Philip Morris' preemption defense but is ruling that the FTC's regulation of Philip Morris' cigarette testing and advertising rises to a level sufficient to invoke federal jurisdiction under the federal removal statute." Slip op. at 24.

In their brief before this Court Watson and Lawson state, "For the purposes of the Remand Motion only, Plaintiffs do not contest . . . whether the federal preemption defense it had raised sufficed as a 'colorable' federal defense." Watson and Lawson argue only that Philip Morris failed at a minimum to demonstrate that it acted under the direction of a federal officer, or to show a causal nexus between plaintiffs' claims and the acts of Philip Morris, allegedly performed under the color of a federal office.

Although we are required to review the requirement of a colorable federal defense for jurisdictional purposes, the threshold is quite low. We do not require the defendant to "win his case before he can have it removed." *Willingham v. Morgan*, 395 U.S. 402, 407, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969). The defendant need only raise a "colorable" federal defense. *Id.*; *Jefferson County v. Acker*, 527 U.S. 423, 431, 119 S.Ct. 2069, 144 L.Ed.2d 408 (1999). We have no hesitation in concluding that Philip Morris, in its Notice of Removal, has set forth a colorable federal defense which Watson and Lawson have not contested.

The fourth requirement for federal officer removal is that the party must be a "person" within the meaning of the statute. Several courts have concluded that a corporation can be a "person" within the requirements of federal officer removal. *See Ryan v. Dow Chem. Co.*, 781 F.Supp. 934, 946- 47 (E.D.N.Y.1992); *Fung v. Abex Corp.*,

816 F.Supp. 569, 572 (N.D.Cal.1992). We find the analysis in *Ryan* to be persuasive.

We affirm the district court's order denying remand and finding removal proper under section 1442(a).

GRUENDER, Circuit Judge, concurring.

I fully concur in the court's opinion and judgment. I write separately to emphasize that our decision today should not be construed as an invitation to every participant in a heavily regulated industry to claim that it, like Philip Morris, acts at the direction of a federal officer merely because it tests or markets its products in accord with federal regulations. I believe that in most instances, a contract, principal-agent relationship, or near-employee relationship with the government will be necessary to show the degree of direction by a federal officer necessary to invoke removal under 28 U.S.C. § 1442(a)(1). *See Virden*, 304 F.Supp.2d at 845-46 (collecting cases embodying the "regulation plus" concept, where limited discretion under a government contract, action as an agent for the federal government, or action in the nature of a government employee, in addition to government regulation, supported a defendant's invocation of the federal officer removal statute).

In this case, as the court's opinion makes clear, the FTC's direction and control of the testing and marketing practices at issue is extraordinary. The FTC developed the Cambridge Filter Method, conducted the testing itself for twenty years before farming it out to the cigarette companies, threatened a deceptive advertising action if the method of testing deviated in the smallest way from the government-mandated method and controlled the disclosure of the results throughout. Because the FTC passed the function of performing the testing to the cigarette companies while allowing them no independent control of the process whatsoever, this is a rare case in which federal officer jurisdiction is appropriate even in the ab-

sence of a contract, principal-agent relationship, or near-employee relationship with the government.

With these observations, I join the court's opinion and judgment.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

Case No. 4:03-CV-519 GTE

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., AND PHILIP MORRIS, INCORPORATED,
Defendants.

[Filed Dec. 12, 2003]

MEMORANDUM OPINION AND ORDER

Eisele, J.

Before the Court is the Plaintiffs' Motion to Remand, to which the Defendants have responded. For the reasons provided herein, the Plaintiffs' Motion will be denied.

I. Procedural Background

Plaintiffs filed this action on April 18, 2003 in the Circuit Court of Pulaski County, Arkansas, Sixth Division. On May 29, 2003, Plaintiffs filed an Amended Complaint. On June 3, 2003, Defendants were served. Defendants removed the action to this Court on July 2, 2003. Plaintiffs filed the instant Motion for Remand on August 1, 2003. The Court has also received and reviewed the Defendants' Memorandum in Opposition, filed on August 20, 2003; the Plaintiffs' Reply Memorandum, filed on September 12, 2003; the Defendants' Supplemental Memorandum, filed on November 18, 2003; and the Defendants' letter of November 19, 2003 submitting additional exhibits

(66-71). Oral argument was conducted on November 20, 2003.

Plaintiffs are smokers who have consumed approximately one pack of Marlboro Lights or more over at least the past six years. They allege that Philip Morris[1] violated the Arkansas Deceptive Trade Practices Act, Ark.Code Ann. § 4-88-107 *et seq.*, by deceptively marketing cigarettes as "lighter," or lower in tar. The essence of Plaintiffs' complaint is that Philip Morris advertised their cigarettes as light despite the fact that the cigarettes conveyed more tar and nicotine to smokers than shown by the Federal Trade Commission ("FTC") testing method, known as the Cambridge Filter Method.[2] The Plaintiffs' First Amended Complaint, filed in Pulaski County Circuit Court, states in pertinent part:

> 9. While marketing and promoting decreased tar and nicotine deliveries, Defendants designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the "Cambridge" or "Ogg" testing apparatus-the testing machine used by the tobacco industry to "measure" tar and nicotine levels in cigarettes-than would be delivered to the consumers of the product. Defendants controlled the tar and nicotine delivery of Cambridge Lights and Marlboro Lights cigarettes under machine testing conditions apparently to achieve support for their representations that their Cambridge Lights and Marlboro Lights cigarettes are "light" and contain decreased tar and nicotine and that their Marlboro Lights cigarettes contain "lowered tar and nicotine."

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[1] Throughout this opinion, the Court's reference to "Philip Morris" refers to Defendants Philip Morris Companies, Inc. and Philip Morris Incorporated jointly. The Court notes that Defendants' Supplemental Memorandum styles the case as "Watson, et al. v. Altria Group, Inc., et al." However, neither party has filed any amendment inserting Altria Group, Inc. as a Defendant.

[2] The "Cambridge Filter Method" is often referred to as the "FTC Method." The terms are used interchangeably in this Order.

10. Defendants representations that Cambridge Lights and Marlboro Lights cigarettes are "lighter" (ie: lower tar and nicotine) than regular cigarettes are deceptive and misleading and constitute unfair business practices.

11. Not only do consumers receive higher levels of tar and nicotine than the testing apparatus registers, but the smoke produced by Cambridge Lights and Marlboro Lights is more mutagenic (causing genetic and chromosomal damage) per milligram of tar than 'regular' cigarettes.

12. Defendants engaged in a common course of unfair business practices and/or deceptive and unlawful conduct in connection with the manufacture, distribution, promotion, marketing, and sale of Cambridge Lights and Marlboro Lights cigarettes by:

a. Falsely and/or misleadingly representing that their product is "light" and/or delivers lowered tar and nicotine in comparison to regular cigarettes;

b. Describing the product as light when the so-called lowered tar and nicotine deliveries depended on deceptive changes in cigarette design and composition that dilute the tar and nicotine content of smoke per puff as measured by the industry standard testing apparatus, but not when used by the consumer;

c. Intentionally manipulating the design and content of Cambridge Lights and Marlboro Lights cigarettes in order to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and nicotine. These manipulations include, but are not limited to, the modification of tobacco blend, weight, rod length, and circumference; the use of reconstituted tobacco blend, weight, rod length, and circumference; the use of reconstituted tobacco sheets and/or expanded tobacco; and the increase of smoke pH levels by chemical processing and additives, such as ammonia, which resulted in the de-

livery of greater amounts of tar and nicotine when smoked under actual conditions than Defendants represent by use of the "light" description;

d. Employing techniques that purportedly reduce machine-measured levels of tar and nicotine in Cambridge Lights and Marlboro Lights cigarettes, while actually increasing the harmful biological effects, including mutagenicity (genetic and chromosomal damage) caused by the tar ingested by the consumer per milligram of nicotine.

13. Through longstanding fraudulent and unfair conduct, Defendants willfully deceived consumers, including the Plaintiffs named herein, regarding the nature and effect of their "light" cigarettes.

Plaintiffs further indicate in their First Amended complaint that they seek class action status, with the class to include all persons who purchased Cambridge Lights and Marlboro Lights cigarettes in Arkansas for personal consumption since those cigarettes were first sold in the state.

Defendants contend that this court has jurisdiction under 28 U.S.C. § 1442(a) because Philip Morris is "a person acting under" the direction of an officer of the United States for purposes of cigarette testing and advertising. Defendants also argue that federal question jurisdiction under 28 U.S.C. § 1331 is appropriate because Plaintiffs' complaint, though premised on the Arkansas Deceptive Trade Practices Act, necessarily implicates the FTC's cigarette testing and advertising requirements, including the accuracy of the Cambridge Filter Method. Plaintiffs argue that federal jurisdiction is not appropriate under either § 1442 or § 1331 because their allegations center on Philip Morris' deceptive advertising, not the faults of the Cambridge Filter Method. The Court concludes, for the reasons stated below, that it has jurisdiction under 28 U.S.C. § 1442(a)(1). Therefore, the Court will not address removal pursuant to 28 U.S.C. § 1331.

II. Factual, Statutory, and Regulatory Background

The FTC's jurisdiction over advertising and testing of tar and nicotine content of cigarettes is premised on the Federal Trade Commission Act. Title 15 U.S.C., Section 45(a) of the Act declares unlawful "unfair methods of competition in or affecting commerce and unfair and deceptive acts or practices in or affecting commerce." Section 45(a) also grants the FTC broad authority to prevent such unfair and deceptive acts, including unfair and deceptive advertisements for products such as tobacco. *See Federal Trade Commission v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40 n. 2 (D.C.Cir.1985).

Judge Bork discussed the FTC's regulation of the advertising of tar and nicotine content claims in the following excerpt from *Brown & Williamson*:

> Since at least the mid-1950's the FTC has been concerned about the validity of tar and nicotine content claims in cigarette advertising. In 1955 the Commission published cigarette advertising guides advising manufacturers to make no representations about the tar and nicotine content of a cigarette that could not be supported with reliable scientific evidence. By the mid-1960's the FTC became concerned about the absence of a standard method for testing cigarette delivery of tar and nicotine. Accordingly, in 1967 the Commission adopted a testing method and began a program to analyze the tar and nicotine levels of each brand of cigarettes sold in the United States.
>
> The test adopted by the FTC is known as the Cambridge Filter Method and is used with minor variations throughout the world. The test utilizes a smoking machine that takes a 35 milliliter puff of two seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length. The tar and nicotine collected by the machine is then weighed and measured. This provides an objective basis for assessing the relative amounts of tar and nicotine different cigarettes will deliver when they

are smoked in the same way. The test does not measure the amount of tar or nicotine that any individual smoker may receive since that quantity will depend on individual smoking behavior.

In 1970, the FTC proposed a formal rulemaking in order to promulgate a Trade Regulation Rule requiring disclosure of FTC tar and nicotine ratings in cigarette advertising. Immediately following this proposal, five leading cigarette companies, including B & W, agreed among themselves to a voluntary disclosure plan (the "1970 agreement"). This plan provided that the cigarette manufacturers would disclose the tar and nicotine figures in all advertising for their cigarettes according to the most recently published Commission test results. Upon accepting the 1970 agreement, the FTC indefinitely suspended its rulemaking proceeding.

Brown & Williamson, 778 F.2d at 36-37. The FTC's proposed rule was published in the Federal Register. *See* Proposed Rule Making by the Federal Trade Commission Regarding Advertising of Cigarettes, 35 Fed.Reg. 12671 (August 8, 1970). The voluntary agreement itself was reflected in a letter to the FTC signed by eight cigarette manufacturers, including Philip Morris. That letter states:

In accordance with the Commission Press Release of October 1, 1970, each of the undersigned companies which manufactures, or is a primary distributor of, varieties of cigarettes which are presently advertised, and any of its subsidiaries similarly engaged, is writing to set forth a voluntary program for the disclosure of "tar" and nicotine in its paid consumer-directed cigarette advertising in the United States placed by each of the undersigned companies.

Under this program, each company will disclose clearly and prominently for the variety of cigarettes advertised the values for "tar" in milligrams and for nicotine in tenths of a milligram contained in the

> Federal Trade Commission published test results, under its present methodology, in all advertising newspapers, magazines, and other periodicals published and distributed in the United States. . . . Each of these advertisements will include the "tar" and nicotine data, as rounded off by the Federal Trade Commission, from the Commission test results most recently published in the Federal Register. . . . Necessarily, the carrying out of this voluntary program is predicated upon the Commission continuing to test the advertised varieties of cigarettes and to publish its results in the Federal Register at regular and periodic intervals of not more than six months. . . . Each of these companies is confident that the program presented, which they intend to begin thirty working days after the Commission has considered it in lieu of any formal Trade Regulation Rule proceeding and hearing, constitutes a plan that is feasible.

See Defendants' exhibit 66, Letter from Ross R. Millhiser, President, Philip Morris, U.S.A., et. al. to Federal Trade Commission (December 17, 1970).

As the FTC recently stated, the voluntary agreement "remains in effect today, and it forms the basis for current disclosure of tar and nicotine yield." *See* Cigarette Testing;-Request for Public Comment, Federal Trade Commission, 62 Fed.Reg. 48158, 1997 WL 563104 (February 12, 1997). The FTC itself tested cigarettes in its own lab using the Cambridge Filter Method until 1987. *Id.* Lee Peeler, an employee of the FTC since 1973, testified in a Rule 30(b)(6) deposition in the case of *United States v. Philip Morris, Inc.*, then pending in the District of Columbia Federal District Court, regarding the approximately twenty year period in which the FTC tested cigarettes in its own lab:

> A. The point I was trying to make is that the . . . operation of the cigarette lab was really something that was unique and . . . was designed to prevent a certain type of deception, but . . . as we said when we closed the lab it was unusual for a pro-

gram like that to be maintained by the Commission.

Q. Right. We're going to talk about that specifically. There are other industries that run testing and it was unusual for the Commission itself to be running the testing for the cigarette industry, right?

A. It is both unusual for the Commission to be running the testing and to be the agency that specified the testing methodology because . . . I can't recall any other instances where the FTC itself specifies the testing methodology . . . . .

Q. Okay, Now I think you testified earlier that having the FTC run the testing lab is unusual.

A. Among government programs it seems very unusual to have an agency actually doing the testing for an industry.

See Defendants' Exhibit 70, Deposition of C. Lee Peeler, Deputy Director of the Bureau of Consumer Protection of the FTC, pp. 96-97, taken in connection with *United States v. Philip Morris*, Case No. 99-CV-02496 (D.D.C. July 30, 2002).

In 1987, the FTC closed its testing lab, but required manufacturers, including Philip Morris, to continue testing cigarettes using the Cambridge Filter Method. *See* Cigarette Testing; Request for Public Comment, Federal Trade Commission, 62 Fed.Reg. 48158, 1997 WL 563104. Responsibility for conducting the testing was transferred to the Tobacco Institute Testing Lab ("TITL")[3], and the voluntary agreement was modified to reflect the change. *See* Defendants' Exhibit 67, Letter from John P. Rupp, counsel to TITL, to Judith P. Wilkenfield, Program Adviser, Cigarette Advertising and Testing, Federal Trade

[3] TITL had been testing cigarettes under the Cambridge Filter Method prior to the transfer of authority in 1987. *See* Peeler Deposition at 198. The TITL lab and the FTC lab had collaborated to ensure accuracy of test results. *Id.* The FTC considered the uniformity between TITL's testing results and the FTC lab's testing results in abolishing the FTC lab and transferring sole testing authority to TITL. *Id.*

Commission dated June 30, 1987; *see also* Cigarette Testing, 62 Fed.Reg. 48158. Although TITL is an industry funded lab, the FTC retains the authority to inspect the lab. *Id*; *see also* Defendants' exhibit 70, Peeler Deposition at 201. An FTC contractor and former director of the FTC laboratory has unrestricted access to the TITL laboratory to monitor and review the testing process. *See* Defendants' Exhibit 20, Federal Trade Commission, Tar, Nicotine, and Carbon Monoxide of the Smoke of 1206 Varieties of Domestic Cigarettes for the Year 1994 (1997). Additionally, the FTC requires cigarette manufacturers, by "compulsory process" to provide results of TITL testing for all cigarettes to the FTC. *See* Cigarette Testing, 62 Fed.Reg. 48158; *see also* Peeler Deposition at 202. The results obtained by the FTC are published annually in the Federal Register.

The FTC recently described the FTC Method in a request for public comment published in the Federal Register:

> Thus, although some changes have been made, the modified Cambridge Filter Method adopted by the Commission in 1967 remains essentially in place today. The Commission's test method was not designed 'to determine the amount of 'tar' and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by a machine in accordance with the prescribed method.' The purpose of the program was to provide smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands. This goal was consistent with the then-consensus of the scientific community that lower tar and nicotine cigarettes should be less harmful than higher tar and nicotine brands.

See Cigarette Testing; Request for Public Comment, Federal Trade Commission, 62 Fed.Reg. 48158. (February 12, 1997).

In addition to mandating the disclosure of tar and nicotine values under the FTC Method in all cigarette advertising, the FTC permits a manufacturer to advertise a cigarette as "low tar" or "light" if a cigarette's tar value under the FTC Method is 15.0 mg or less.[4] As with disclosure of tar and nicotine values under the FTC Method, no formal rule permitting descriptors such as "light" or "low tar" was ever promulgated. However, the FTC has, in a variety of advisory opinions and proceedings, expressed its view that cigarette companies engage in deceptive advertising in violation of the Federal Trade Commission Act when they advertise cigarettes as "light" or "low tar" without publishing Cambridge Filter Method test results that reflect that the cigarettes are, in fact, "low tar."

In 1971, the FTC issued a complaint against American Brands, Inc. for advertising cigarettes as "lower in tar" without disclosing Cambridge Filter Method tar ratings. *In the Matter of Am. Brands*, 79 F.T.C. 255, 258-259 (1971). As a result of that complaint, the FTC and American Brands, Inc. entered into a consent order requiring American Brands to cease advertising its cigarettes as low tar without clearly disclosing FTC Method tar ratings. *Id.* In 1978, the FTC issued an advisory opinion to Lorillard, another cigarette manufacturer. *See In re Lorillard*, 92 F.T.C. 1035 (1978); *see also* Defendants' Exhibit 70, Peeler Deposition at 470. That opinion stated the Commission's view that it would be deceptive to advertise a cigarette tar figure that differed from that obtained using the FTC method. *Id.*

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[4] The FTC stated in Reports to Congress for 1979 and 1980 that it defined "low tar" as 15.0mg or less of tar under the Cambridge Filter Method. *See* Defendants' Exhibits 55 and 56, Federal Trade Commission, Report to Congress, Pursuant to the Federal Cigarette Labeling and Advertising Act, For the Years 1979 and 1980, n.8, n.11; *but see* Cigarette Testing, Request for Public Comment, Federal Trade Commission, 62 Fed.Reg. 48158 (February 12, 1997) (stating that the FTC had never defined 'low tar"). The FTC has not formally defined other descriptors, such as "ultra low tar," but that term is generally understood to mean 6 mg or less of tar and nicotine. *Id.*

In 1981, the FTC began an investigation of Brown and Williamson, manufacturer of Barclay cigarettes, for advertising cigarettes as "1 mg tar, .2 mg nicotine by the FTC method." *See FTC v. Brown & Williamson*, 778 F.2d 35, 37 (D.C.Cir.1985). The FTC first concluded that the method did not accurately measure the tar content of Barclay cigarettes, and attempted to require Barclay advertisements to state an estimated tar content of 3 to 7 mg. of tar. *Id.* at 38. Barclay refused, but revised its advertisements to state that the 1 mg tar content was produced using a method recognized by independent laboratories, not the FTC. *Id.* The FTC filed suit in Federal District Court seeking an injunction to prevent Brown and Williamson from continuing to advertise Barclay cigarettes in a false and deceptive manner in violation of § 45(a) of the Federal Trade Commission Act. *Id.* The District Court granted injunctive relief, which the District of Columbia Court of Appeals eventually curtailed on First Amendment grounds. *Id.* *See* further discussion *infra*.

The FTC again challenged a cigarette manufacturer's "low tar" advertising in 1994 when it contested American Tobacco's claim that consumers would get less tar by smoking 10 packs of Carlton cigarettes than by smoking a single pack of the other brands. The FTC found these advertisements deceptive, and entered into a consent agreement with American Tobacco prohibiting the ads.

Despite the FTC's pursuit of companies that did not disclose FTC Method test results with their "light" advertisements, the FTC acknowledged flaws in the FTC Method on several occasions. In 1977, the FTC evaluated the FTC Method's ability to measure tar delivery to human smokers when cigarettes are designed with ventilation holes. Ventilation holes, like the various cigarette design components that Plaintiffs allege Philip Morris uses, cause smokers that smoke in certain ways to receive a higher amount of tar and nicotine than is reflected in the FTC Method's ratings. After investigating, the FTC directed that the FTC Method would not be changed. In 1981, the FTC evaluated the Cambridge Filter Method's

inability to measure the tar and nicotine content of Barclay Cigarettes. *See Brown & Williamson*, 778 F.2d at 37. Other cigarette manufacturers, including Philip Morris, complained to the FTC that the ventilation system in Barclay cigarettes produced a lower tar rating under the FTC Method, but produced much higher tar when smoked by actual humans. *Id.* at 37. Although the FTC concluded in 1982 that the FTC Method did not accurately measure Barclay cigarettes, the FTC continued to mandate that all cigarettes other than the Barclay be tested according to the method. *Id.* at 38. The FTC also continued to evaluate the FTC Method after the *Brown & Williamson* decision. An FTC official acknowledged this evaluation, when she stated:

> Since the Brown & Williamson decision, the Commission has conducted an ongoing review of the cigarette testing methodology that, among other things, has examined possible ways to measure the effects of compensatory smoking, but to date no cigarette company, scientific agency or health group has offered a viable alternative to the present testing system.

See Defendants' Exhibit 33, Letter from E. Rock to Hon. T.A. Luken (June 17, 1988). The Cambridge Filter Method remained mandatory for all cigarettes but Barclay. *See Brown & Williamson*, 778 F.2d at 37.

In 1997, the FTC solicited public comment on proposed ways to alter the FTC Method and to change cigarette advertising to better reflect the method's inability to measure the tar and nicotine actually conveyed to smokers. *See* Cigarette Testing; Request for Public Comment, Federal Trade Commission, 62 Fed.Reg. 48158 (February 12, 1997). The request for public comment summarized the history of the Method and its regulation by the FTC. *Id.* The FTC first acknowledged that the voluntary agreement that bound cigarette manufacturers to disclose FTC Method results formed the basis for the FTC's annual, compulsory demand for cigarette tar and nicotine ratings. *Id.* The request went on to summarize current concerns about the FTC Method:

Changes in cigarette design and increased knowledge about human smoking behavior have highlighted the limitations of the existing test method. In particular, research indicates that smokers switching to cigarettes at the lower end of the range of machine measured nicotine yields tend to take larger and more frequent puffs to satisfy their need for nicotine. This compensatory smoking behavior substantially reduces the informative value of the current ratings. As a result, public and private health groups and others have questioned the usefulness of the FTC ratings over the past few years, suggesting that they may mislead consumers with respect to the relative risks of smoking cigarettes with various levels of tar and nicotine ratings.

The Commission has been especially concerned that some consumers may believe that the existing machine measured yields are literal indicators of how much tar and nicotine they will get from particular brands of cigarettes. To the extent that smokers interpret current tar and nicotine disclosures in this manner, they may fail to understand that the amount of tar and nicotine they get from a cigarette depends in part on how that cigarette is smoked. In addition, smokers--especially those who engage in compensatory smoking--may underestimate the risk associated with lower rated brands by assuming that a very low tar yield necessarily translates into a correspondingly low health risk. In fact, even the lowest rated cigarette represents an important adverse health risk. . . .

The FTC protocol was based on cursory observations of human smoking behavior. Actual human smoking behavior is characterized by wide variations in smoking patterns which result in wide variations in tar and nicotine exposure. Smokers who switch to lower tar and nicotine cigarettes frequently change their smoking behavior which may negate potential health benefits.

Cigarette Testing, 62 Fed.Reg. 48158. The request for comment also cites several changes to the FTC Method proposed at a conference held by the National Cancer Institute at the request of the FTC, and requests comments on ways to improve communication of the FTC Method ratings through advertising. *Id.* In addressing the weaknesses of the current advertising requirements, the Commission commented:

> Finally, the Commission considered keeping the current unitary rating system and adding disclosures warning smokers that the amount of tar and nicotine they get will vary depending on how a cigarette is smoked. This plan has the advantage of avoiding the costs and complexities involved in moving to a two-tier system. It would emphasize the artificial nature of the smoking machine measurements and the fact that ratings produced by machines do not indicate what smokers actually get from their cigarettes. The advertising disclosure, along with appropriate education efforts, could potentially inform smokers about compensation and ways to avoid it. The Commission believes, however, that unitary ratings will be less effective than a range of ratings in communicating to smokers the variability in potential smoke ingestion.
>
> The Commission is seeking comment on the desirability and feasibility of these alternative approaches to revising the test method.

Id.

In 1998, the FTC informed Senator Frank Lautenberg, in response to his letter inquiring as to the status of the proposed changes, that the FTC was still evaluating problems with the Cambridge Filter Method. *See* Defendants' Exhibit 63, FTC News (Nov. 24, 1998). Finally, Defendant's counsel reported to this Court at oral argument that the FTC continues to evaluate the Cambridge Filter Method at the present time, but has not yet adopted any other testing procedure or any substantial changes to the Method. Additionally, Peeler testified in his deposition

that the FTC had not come to a final determination as to whether to keep, abandon, or revise the Method. *See* Defendants' Exhibit 70, Peeler Deposition at 367, 587.

As the Peeler deposition and the FTC's 1997 request for public comment make clear, the voluntary agreement of 1970 remains in place and the FTC continues to ensure compliance with that agreement by inspecting the TITL testing facility, compelling cigarette manufacturers to disclose tar and nicotine ratings for all cigarettes both to the FTC and in all advertisements, and publishing tar and nicotine figures in the Federal Register.

III. Discussion

Ordinarily, the Court may only accept a case upon its removal from a state court if the lawsuit is one that could have been originally brought in federal court. *See* 28 U.S.C. § 1441. For example, removal is appropriate in federal question cases, that is, cases arising under the Constitution, laws or treaties of the United States, because Federal Courts have original jurisdiction over those cases under 28 U.S.C. § 1331. In the typical § 1331 situation, the well-pleaded complaint rule provides that a civil action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law. *See Crews v. General American Life Ins. Co.*, 274 F.3d 502, 504-05 (8th Cir. 2001). As a general rule, a federal defense will not give rise to federal question jurisdiction. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

The federal officer removal statute, 28 U.S.C. § 1442, provides an exception to the general rule. This statute "serves to overcome the 'well-pleaded complaint rule' which would otherwise preclude removal even if a federal defense were alleged." *See Mesa v. California*, 489 U.S. 121, 136, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989). "The right to removal [under § 1442] 'is made absolute whenever a suit in a state court is for any act under color of federal office, regardless of whether the suit could originally have been brought in federal court.'" *See United States v. Todd*,

245 F.3d 691, 693 (8th Cir. 2001) (quoting *Willingham v. Morgan*, 395 U.S. 402, 406, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969)).

A. Standard for Removal based on Federal Officer Jurisdiction

28 U.S.C. § 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place where it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office . . .

Id. In *Mesa*, the United States Supreme Court set forth a three-part test for determining whether § 1442(a)(1) is applicable. To remove under § 1442(a)(1), a defendant must: (1) have acted under the direction of a federal officer; (2) raise a "colorable" federal defense to the plaintiffs' claims and (3) demonstrate a causal nexus between plaintiffs' claims and the acts Defendant performed under color of federal office. *Mesa*, 489 U.S. at 124-25. A defendant must also be a "person" within the meaning of § 1442(a)(1).

The Plaintiffs do not dispute that both of the Defendant corporations are "persons" within the meaning of § 1442(a)(1). *See Ryan v. Dow Chem. Co.*, 781 F.Supp. 934 (E.D.N.Y.1992) (Holding a corporation to be a person within the statute and noting that "a corporation could be engaged in activities that amount to the implementation of federal policy under the direction of a government officer.") They also do not dispute that the federal preemption defense raised by the Defendants is a "colorable" claim to a federal defense.[5] *See United States v. Todd*, 245 F.3d 691,

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[5] The Court notes the case of *U.S. v. Philip Morris*, in which the District Court for the District of Columbia held that FTC jurisdiction over

693 (8th Cir. 2001) ("For a defense to be considered colorable, it need only be plausible; § 1442(a)(1) does not require a court to hold that a defense will be successful before removal is appropriate"). Plaintiffs, however, do contest whether Philip Morris was acting at the direction of a federal officer and whether a causal nexis exists between Philip Morris and the FTC regarding the testing and marketing of "light" cigarettes.

The "person acting under" element and the causal nexis element tend to converge into a single issue: whether the actions that form the basis of the state suit were performed pursuant to comprehensive and detailed federal government regulation. *See Ryan v. Dow Chem. Co.*, 781 F.Supp. at 947. Participation in an industry regulated by the federal government is insufficient alone to support removal. There must also be detailed and specific involvement by the federal government. *Id.* If direct and detailed regulation does exist, the Defendant must have been following that federal direction in performing the actions that form the basis of the lawsuit. *Id.* To determine whether Philip Morris acted under the direction of a federal officer, the Court must decide whether the FTC's regulation of cigarette testing and advertising constitutes the direct and detailed control required to invoke § 1442(a)(1) jurisdiction and whether the manner in which Philip Morris tested and advertised Malboro Lights and Cambridge Lights was directed by the FTC.

Several courts have addressed the level of regulation necessary for a private person or corporation to act under the direction of a federal officer. In many of these cases, courts have evaluated whether government contractors

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cigarette advertising, marketing, promotion and warning claims did not prevent the government from bringing civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims against several cigarette manufacturers for a wide range of actions involving deceptive advertising. *See U.S. v. Philip Morris*, 263 F.Supp.2d 72 (D.D.C.2003). The Court would consider this case in ruling on the merits of Defendants' preemption defense, but does not believe that *U.S. v. Philip Morris* prevents Defendants' preemption defense from being "colorable."

had sufficiently detailed contact with the contracting agency to allow federal officer removal. In *Crackau v. Lucent*, 2003 WL 21665135 (D.N.J. June 25, 2003), radar technicians and operators sued the manufacturer of certain radar devices for injuries sustained due to exposure to ionizing radiation allegedly emitted by the radar devices. *Id.* at 1. Jurisdiction under § 1442(a)(1) centered on the U.S. Army's involvement in the development of the radar system. At a hearing on a motion to remand, Lucent presented evidence that the Army controlled training given to technicians, wording in manuals accompanying radar devices, and specifications of the radar system at issue in the suit. *Id.* at 3. Lucent would have had to obtain prior approval from the Army before modifying the equipment used in manufacturing the radar system. *Id.* at 3. Since "government guidelines and specifications controlled Lucent's activities," the Court concluded that federal officer jurisdiction existed. *See Crackau*, 2003 WL 21665135 at 5.

Similarly, in *Fung v. Abex Corporation*, 816 F.Supp. 569 (N.D.Cal.1992), employees of a contractor sued the contractor for damages arising from injuries allegedly caused by exposure to asbestos during manufacture of submarines for the Department of Defense. The Department of Defense monitored the manufacture of the submarines, required construction and repair in accordance with contract specifications, and subjected all supplies used in the manufacturing process to inspection, test, and approval. *Id.* at 572-573. The Court found that this level of governmental oversight was "direct and detailed," rendering federal officer removal appropriate. *Id.*

Another case involving a Department of Defense contractor reached a different conclusion. In *Ryan v. Dow Chemical*, civilians present in Vietnam sued the manufacturers of "Agent Orange" in state court for injuries caused by exposure to the herbicide. *See Ryan*, 781 F.Supp. at 937. The manufacturers attempted to remove under § 1442(a)(1), arguing that contracting to sell, manufacture, and deliver Agent Orange to the Department of Defense satisfied the "acting under" requirement. *Id.* The Court

acknowledged that the interaction between the manufacturers and the Defense Department presented a close call, but ultimately decided that federal officer removal was not appropriate. *Id.* at 947, 953. The Court distinguished the design and formulation of Agent Orange from the production and delivery of the herbicide. *Id.* at 950. The Court noted that the Department of Defense did not control the herbicide's development, but only directed the production and sale of the product. *Ryan*, 781 F.Supp. at 950. Therefore, the Court concluded that the manufacturers did not act under the direction of a federal officer when they created Agent Orange. *Id*; *see also Pack v. AC and S, Inc.*, 838 F.Supp. 1099, 1103 (D.Md.1993) (Holding government construction, design, and testing of turbines under government specifications amounted to direct and detailed control, constituting more government direction than the purchase at issue in *Ryan*).

Two cases involving personnel associated with the Office of Economic Opportunity (OEO) are also instructive. In *Oregon v. Cameron*, 290 F.Supp. 36 (D. Oregon 1968), the state of Oregon sued workers in the Volunteers in Service to America ("VISTA") program for trespass stemming from an incident in which the volunteers went onto a farm to pick up a child of migrant workers for a visit to a doctor. 42 U.S.C. § 2992 authorizes the director of the OEO "to work in meeting the health, education, welfare, or related needs of . . . migratory workers and their families." Based on this statute and the OEO's general directions that VISTA volunteers were to work with migrant farm workers, the Court concluded that the volunteers acted under the direction of a federal officer in entering the farm to pick up the child. *Id.* at 38. The Court reached this conclusion even though 42 U.S.C. § 2992 emphasizes the limited employee status of VISTA personnel.

The second OEO case involved attorneys with a legal services corporation. *See Gurda Farms v. Monroe County Legal Assistance Corp.*, 358 F.Supp. 841 (S.D.N.Y.1973). Employers of migrant farm workers brought suit against a legal assistance corporation and lawyers associated with

the corporation for conspiracy to induce workers to breach their employment agreements and for civil assault. *Id.* at 842. The Monroe County Legal Assistance Corp. received a grant from the OEO to serve the needs of migrant farm workers. *Id.* at 845. In order to receive the grant, the Corporation was required to comply with several O.E.O. regulations, including submitting reports and allowing audits to be performed. *Id.* The O.E.O.'s conditions for receipt of the grant amounted to sufficient governmental involvement for the Court to conclude that the attorneys were acting at the direction of a federal officer when they interacted with migrant farm workers. *Id.* at 847.

Courts have also applied § 1442(a)(1) to Medicare intermediaries. The consistent holding from these cases is that private companies acting as intermediaries in the Medicare program are persons acting under the direction of the Secretary of Health and Human Services and therefore eligible to remove actions under § 1442(a)(1). *See Peterson v. Blue Cross/Blue Shield*, 508 F.2d 55 (5th Cir.), *cert. denied*, 422 U.S. 1043, 95 S.Ct. 2657, 45 L.Ed.2d 694 (1975); *Neurological Assocs. v. Blue Cross/Blue Shield*, 632 F.Supp. 1078 (S.D.Fla.1986); *Group Health Inc. v. Blue Cross Ass'n*, 587 F.Supp. 887 (S.D.N.Y.1984); *see also Kuenstler v. Occidental Life Ins. Co.*, 292 F.Supp. 532 (C.D.Cal.1968); *Allen v. Allen*, 291 F.Supp. 312 (S.D.Iowa 1968); *see also Ryan*, 781 F.Supp. at 949. Medicare intermediaries are charged with administering the Medicare program. *See Ryan*, 781 F.Supp. at 949. They are subject to "extensive and specific" federal regulations and must satisfy "performance criteria" to remain in service as intermediaries. *Id.* at 949. After evaluating the medicare intermediary removal caselaw, the Ryan court concluded that these cases do not stand for the proposition that removal solely on the basis of a contract with the government is allowed under § 1442(a)(1). *Id.* at 949. Instead, some additional level of involvement between private entities and the government is required for the private entity to qualify for federal officer removal. *Id.*

The Eighth Circuit Court of Appeals has seldom considered the application of § 1442(a)(1) to private corporations associated with a governmental agency. *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843 (8th Cir.1980) discusses the federal officer removal statute's application to a private company more extensively than any other Eighth Circuit case. *First National Bank of Aberdeen* involved an allegation by one bank that another bank had adopted a deceptively similar name. *Id.* at 846. The removing bank argued that federal officer jurisdiction existed because the Comptroller General of the United States had approved the name change. *Id.* The Eighth Circuit found this connection to a federal officer too remote to warrant removal based on § 1442(a)(1). *Id.* at 849, n. 13; *but see First National Bank of Bellevue v. Bank of Bellevue*, 341 F.Supp. 960 (8th Cir. 1972) (Holding removal under § 1442(a)(1) appropriate where the Secretary of the Treasury and the Department of the Air Force approved the establishment of a bank branch office on a U.S. Air Force Base).

After surveying the cases applying § 1442(a)(1), this Court concludes that, in order to obtain federal jurisdiction as a corporation "acting under the direction of a federal officer," the corporation and the federal government must interact in a way that evinces more federal control than the typical regulatory situation. As one court put it, "the rule that appears to emerge from the case law is one of regulation plus." *See Bakalis v. Crossland Bank*, 781 F.Supp. 140, 144-145 (E.D.N.Y.1991). Not only must the appropriate level of regulation be present, but the regulation must go to the heart of the cause of action asserted against the private corporation. Unfortunately, as the court in *Gurda Farms* acknowledged, "the number and complexity of federal institutions and programs render impossible the formulation" of a "precise standard for the extent of control necessary to bring an individual [or corporation] within the 'acting under' clause." *See Gurda Farms*, 358 F.Supp. at 844. The Court now turns to apply-

ing the somewhat amorphous standard of § 1442(a)(1) to the FTC's regulation of and interaction with Philip Morris.

B. Application of Federal Officer Statute to this case

This Court concludes that Philip Morris acted under the direction of a federal officer within the meaning of § 1442(a)(1) when it cited the tar and nicotine values derived from the FTC Method in its Malboro Light and Cambridge Light advertisements. The FTC's regulation of cigarette testing and advertising spans over forty years and is detailed and specific. The cigarette manufacturers entered into the "voluntary" agreement of 1970 under the threat of a proposed rule and at the behest of the FTC. In fact, FTC consent was an express condition to the agreement. The letter that set forth the voluntary agreement stated that the cigarette manufacturers "intend to begin thirty working days after the Commission has considered [the agreement] in lieu of any formal Trade Regulation Rule proceeding and hearing . . ." *See* Defendants' Exhibit 66, Letter from Millhiser. But for the FTC's actions, the manufacturers would not have entered into the agreement. Nor would the manufacturers have been obliged to test cigarettes under the FTC Method. Further, the fact that the agreement was subject to FTC approval and premised on FTC waiver of a formal rule indicates that the agreement imposed an FTC backed obligation on the cigarette manufacturers to conduct testing in accordance with the method and to disclose the testing results in all advertising.

After the manufacturers entered into the agreement, the FTC remained involved with cigarette testing and advertising in a detailed and specific manner. The FTC took the unusual and unprecedented step of conducting cigarette testing itself for approximately twenty years. Lee Peeler, who was authorized to speak for the FTC in his July, 2002 deposition, testified that this approach was extremely unique and that he could not recall any other industry in which the FTC set forth testing methodology and actually tested products itself. *See* Defendants' Exhibit 70, Peeler

Deposition at 96-97. When the FTC transferred testing responsibility to TITL, it retained and used the authority to monitor TITL's lab through unannounced inspections. From 1987 to the present, the FTC has compelled TITL to produce sworn statements of Method ratings for all cigarettes which ratings were, and are, published annually by the FTC in the Federal Register.

The FTC enforced the agreement's obligation to adhere to the Method's results in cigarette advertising through the FTC's statutory authority to prevent unfair and deceptive practices in commerce. *See* 15 U.S.C. § 45(a). The FTC's 1971 complaint and consent order with American Brands, the 1978 advisory opinion to Lorillard, the 1981 investigation and succeeding lawsuit against Brown & Williamson, and the 1994 complaint and consent order against Carlton all demonstrate that the FTC believes actions contrary to the 1970 agreement and advertising inconsistent with the FTC Method to be deceptive advertising in violation of 15 U.S.C. § 45(a). The FTC clearly views testing and advertising in accordance with the FTC Method as mandatory under 15 U.S.C. § 45(a) and goes to extraordinary lengths to further that mandate. Given the FTC's efforts to direct and enforce use of cigarette ratings derived from the FTC Method in cigarette advertising, it appears clear to the Court that Philip Morris is a "person acting under" the FTC.

With regard to the causation element of § 1442(a)(1), the Court also concludes that the FTC's regulation of Philip Morris's cigarette testing and advertising forms cuts to the heart of the Plaintiffs' lawsuit. Plaintiffs contend that their allegations that Philip Morris deceptively designs their cigarettes to manipulate the FTC Method are wholly independent from testing procedures mandated by the FTC.[6] The Court disagrees. Although Philip Morris is re-

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[6] Plaintiffs state in their Reply Memorandum of Law in Support of Plaintiffs' Motion to Remand: "As made clear in their Motion for Remand, Plaintiffs do not take issue with the testing procedures Philip Morris purports to utilize or with any federal policies that define appropriate mechanisms and procedures for assaying tar and nicotine

sponsible for designing its cigarettes, the FTC mandates the method by which the tar and nicotine content of those cigarettes will be measured for advertising purposes. No matter what cigarette design Philip Morris uses, advertising for that cigarette must disclose the tar and nicotine rating calculated using the FTC Method. The FTC has expressed its opinion that other cigarette manufacturers who advertise tar and nicotine ratings derived from other testing methods violate the unfair and deceptive advertising provisions of 15 U.S.C. 45(a). *See In re Lorillard*, 92 F.T.C. 1035 (1978).

The FTC's consideration of the precise Cambridge method weaknesses that produce the allegedly misleading tar and nicotine ratings further supports the existence of the requisite causal nexis between FTC regulation of Philip Morris and the Plaintiffs' claims. On multiple occasions, the FTC has acknowledged that the FTC Method does not accurately measure the tar and nicotine conveyed to smokers. The FTC has repeatedly examined the very inaccuracies in the FTC Method that form the basis for the Plaintiffs' claims of deceptive advertising. However, the FTC continues to this day to mandate use of the FTC Method for testing and advertising.[7] Assume for the moment that, as Plaintiff alleges, Philip Morris intentionally designs its cigarettes to manipulate the method to produce

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levels in cigarettes. The conduct about which Plaintiffs complain is Philip Morris' deceptive design of its products, which makes the tar and nicotine levels measured by the Cambridge Method testing meaningless, and the Company's fraudulent marketing of its products on the basis of these 'measurements,' in claiming that their products are 'light' and deliver 'lowered tar and nicotine,' when in fact there is nothing light about them."

[7] Philip Morris itself complained of inaccuracies in the FTC Method's testing results when it complained to the FTC in 1980 that the Method inaccurately measured Brown & Williamson's Barclay cigarettes. *See Brown & Williamson*, 778 F.2d at 37-38. As a result of these complaints, the FTC reevaluated the FTC Method, but ultimately decided to continue to mandate the Method (despite its shortcomings) for all cigarettes but the Barclay. *Id.* at 38. *See* Defendants' Exhibit 33, Letter from E. Rock to Hon. T.A. Luken (June 17, 1988).

tar and nicotine ratings below 15mg so that Philip Morris can advertise those cigarettes as "Lights." Such intentional action cannot be separated from the fact that the FTC continues to require testing to be done under the Cambridge Filter Method, mandates that advertisements disclose Method results, and does not permit use of other testing methods in cigarette advertising. The FTC requires adherence to the FTC Method despite its awareness that the FTC Method does not measure actual tar and nicotine conveyed to consumers, especially when cigarettes are designed in certain ways (eg: with ventilation holes). Since the FTC, through its enforcement of the "voluntary" agreement, requires Philip Morris to disclose tar and nicotine ratings derived by using the Cambridge Filter Method in cigarette advertising-and considers the use of any other method in advertising illegal-Plaintiffs' claims that Philip Morris' advertisements are deceptive necessarily calls into question the FTC's regulation of those advertisements.

The Court recognizes that Philip Morris is not required to advertise its cigarettes as "light" or "low tar." However, it is permitted by the FTC to so advertise its cigarettes if they meet FTC's standard. Philip Morris is required to adhere to the FTC's regulation of "lights" advertising. The FTC requires disclosure of Cambridge Filter Method tar and nicotine ratings in cigarette advertisements, and has stated that a cigarette may be advertised as light if its rating using the FTC Method is less than 15mg of tar. Plaintiffs admit that Marlboro Lights and Cambridge Lights are both rated less than 15mg using the FTC Method. Therefore, any contention that Philip Morris' advertising of these two cigarette brands as "Lights" is misleading squarely confronts the FTC's mandate that cigarette companies disclose FTC Method results in advertising and use the Method to determine whether a particular cigarette may be classified as "Light."

Philip Morris' position is unique, but consistent with the holdings of cases involving government contractors. Although this case does not involve a government procurement contract, the FTC's pervasive involvement in ciga-

rette advertising and testing is analogous to the level of governmental control demanded by the courts in *Crackau*, *Fung*, and *Ryan*. The FTC dictates the manner and method by which Philip Morris will test and advertise its cigarettes just as the Department of Defense dictated the materials and specifications to be used in the manufacturing process of radar systems and submarines. The *Ryan* court's distinction between manufacturing of Agent Orange and the Department of Defense's purchase of Agent Orange is not applicable here. In the instant case, the FTC was clearly aware of the shortcomings of its advertising and testing requirements, yet chose to require use of the FTC Method in spite of those downfalls.

Philip Morris' testing and advertising of cigarettes in accordance with the FTC's mandates amounts to more than mere participation in a regulated industry. Philip Morris' testing and advertising obligations are much more specific than the general guidance given to VISTA volunteers in *Cameron* and legal services attorneys in *Gurda Farms*. *See Cameron*, 290 F.Supp. at 38; *Gurda* Farms, 358 F.Supp. at 841. Additionally, the FTC's lengthy and active interaction with cigarette testing and advertising constitutes significantly more hands-on contact than the simple approval of a bank name change. *See First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843, 846. Similar to the "integrated system of officials and private intermediaries" in the Medicare intermediary cases, Philip Morris and other cigarette manufacturers collaborate through TITL with the FTC to test cigarettes. *See Ryan*, 781 F.Supp. at 949. Further, the FTC itself took the extraordinary step of conducting that testing for much of the Plaintiffs' proposed class period. Since the FTC mandates advertising in accordance with the Method and does not permit use of any other method, Philip Morris' "Lights" advertising is closely integrated with the FTC's regulatory regime.

The FTC and cigarette manufacturers, including Philip Morris, have a forty year history of specific, detailed, and unusual regulation of cigarette testing and advertising.

Further, the FTC's mandates directly relate to the core of this lawsuit-whether advertising cigarettes as "Lights," when those cigarettes fall below 15mg under the FTC Method, is deceptive. Therefore, the Court concludes that Philip Morris acted under the direction of the FTC in testing and advertising Marlboro Lights and Cambridge Lights in accordance with the Cambridge Filter Method. In arriving at this decision, the Court emphasizes that it reaches no conclusion on the merits of Philip Morris' preemption defense, but is ruling that the FTC's regulation of Philip Morris' cigarette testing and advertising rises to a level sufficient to invoke federal jurisdiction under the federal officer removal statute.[8] Accordingly, Philip Morris properly removed this case to federal court pursuant to § 1442(a).

C. FTC Regulation Without Formal Rule

The Plaintiffs argue that the lack of formal trade regulation rules requiring use of the FTC Method to determine tar and nicotine values, requiring use of those values in advertisements, and formalizing the 15mg requirement for "Light" advertising forces the conclusion that Defendants, as a matter of law, are not "acting under the direction of a federal officer." The Court disagrees. A formal rule is not required in order for a federal agency to direct the actions of a private company. Formal rules were not present in the government contractor cases cited above. *See Crackau*, 2003 WL 21665135; *Fung*, 816 F.Supp. 569; *Ryan v. Dow Chemical*, 781 F.Supp. 934. Although the OEO possessed statutory authority to assign volunteers to aid migrant workers and to provide financial assistance to meet the legal needs of migrant workers, the courts in *Gurda Farms* and *Cameron* held that § 1442 jurisdiction was appropriate without formal rules addressing interaction with mi-

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[8] As the Court stated above, Plaintiffs have admitted that Defendants asserted federal defense of preemption satisfies the "colorable federal defense" requirement of § 1442. The Court notes that its denial of Plaintiffs' motion to remand is solely jurisdictional. The Court expresses no opinion at this time as to the merits Defendants' preemption defense other than to say that it is colorable as required by § 1442.

grant workers. *Oregon*, 290 F.Supp. 36; *Gurda Farms*, 358 F.Supp. 841. Like the OEO, the FTC possess general statutory authority to regulate cigarette testing and advertising under 15 U.S.C. § 45(a).

The FTC often regulates the industries it governs by compelling voluntary agreements and consent orders rather than promulgating formal rules. In 1987, Daniel Oliver, then Chairman of the FTC testified before a subcommittee of the House of Representatives Energy and Commerce Committee and addressed the manner in which the FTC prefers to regulate. Chairman Oliver stated:

> the FTC has discovered that rulemaking takes a very long time, and I think, therefore it is more efficient to bring a single case against the first offender in order to stop [a certain] practice before we go to rulemaking . . . it is faster – everything the Commission has done has shown that it is faster to bring a single case than to go through rulemaking . . . I'm interested not in rulemaking; I'm interested in having an effect for the benefit of consumers. If I can have a faster and better effect by bringing a case instead of making a rule, I think it serves the consumers' interest better . . . In the case of the cigarette industry, which is what we're talking about, it is entirely reasonable to suppose that one action against cigarette company would have an effect on all of them, and that you would not have to make a rule. You would do the same thing much faster bringing a single case; that would benefit the consumers. So my job is deploying resources, and I would much prefer to bring a case, which can be done in a tenth of the time that making a rule can be done. I think that's a more effective way to deploy law enforcement resources for the benefit of the consumer.

See Defendants' Exhibit 24, Hearing before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce, 100th Cong. 17-19 (1987) (statements of Daniel Oliver, Chairman of the Federal Trade Commission). Lee Peeler also commented

on the FTC's approach to voluntary agreements and consent orders:

> Q. Is there anything nefarious about the FTC obtaining an industry-wide agreement in lieu of a formal rule?
>
> A. The idea of proceeding on a voluntary basis is something the Commission has done in a variety of circumstances with a variety of industries and the Commission looks at these programs to try to make sure that they are done . . . correctly and in the public interest . . . . .
>
> Q. Why does the FTC publish consent orders?
>
> A. We publish consent orders and other final agency actions for a whole variety of reasons . . . one of the purposes of bringing cases is to give guidance to other industry members about what type of conduct we would challenge. The one thing that is confusing sometimes to people is that an order contains . . . provisions that are designed to fence-in conduct . . . the complaint states the violation of laws and the order is a remedial provision.
>
> Q. I want to focus on the phrase you used "to give the industry guidance." Is there any question in your mind that the publication of the decision and order in the matter of American Brands was intended to guide the industry regarding . . . any industry actor's use of the words "low, lower, reduced or like qualifying terms" in cigarette advertising?
>
> A. It would be designed to do that, it would be designed to do that in the context of the ads that are challenged.

See Defendants' Exhibit 70, Deposition of C. Lee Peeler at 96-97.

The United States Court of Appeals for the District of Columbia Circuit has also commented on the FTC's tendency to regulate by obtaining voluntary compliance rather than by pursuing formal proceedings. *See Holloway*

v. Bristol-Myers Corp., 485 F.2d 986, 995 (D.C.Cir.1973). In the context of deciding whether 15 U.S.C. § 45 provided for a private right of action in a class action by consumers against a manufacturer of nonprescription analgesic compound for deceptive advertising, the Court stated:

> Indicative of [Congress'] fundamental policy judgment [in amending the Federal Trade Commission Act] are frequent references in the legislative history to the Trade Commission's expertise in dealing with commercial practices, its ability to act as a buffer in securing voluntary compliance through informal proceedings, and its sound discretion in determining when formal enforcement measures are necessary. Congress voiced approval of the Commission's record in shaping the fluid contours of generalized statutory policy pronouncements into meaningful and coherent rules of business conduct, and it felt that the agency's experience in making concrete the proscriptions of the 1914 Act against 'unfair methods of competition rendered the FTC particularly well suited to the responsibility of giving life to the broad standard of 'deceptiveness' as applied to advertising.

See Holloway, 485 F.2d at 995.

The FTC coerced "voluntary" action in cigarette testing and advertising in such a way that a formal rule is not required for § 1442(a) jurisdiction. The FTC made cigarette manufacturers aware that it intended to promulgate a federal rule to establish a single test to measure tar and nicotine content in cigarettes. The FTC informed the companies that the FTC would not promulgate such a rule if the companies voluntarily entered into an agreement to do such testing. The companies elected to enter into that agreement, at the FTC's behest. The FTC subsequently monitored the manufacturers' compliance with that agreement. Although the FTC had no formal rule to enforce, they used their general statutory authority to prevent unfair or deceptive acts or practices, including advertising, that affect commerce to ensure compliance with the agreement. When companies did not disclose tar and nico-

tine values derived from the FTC Method, the FTC brought enforcement actions against them.

Philip Morris, as required, followed the FTC's directives. Absent FTC regulation in this area, Philip Morris – and other cigarette manufacturers – could advertise "light" cigarettes in any manner and method that they chose. They would be free to use any test to validate their "light" claim. Instead of allowing such freedom in cigarette testing and advertising, the FTC required the FTC Method to be used and the results disclosed in advertisements. Therefore, Philip Morris has been required to use the FTC Method and to adhere to the FTC's advertising directives since the "voluntary" agreement was entered into.

Plaintiffs claim that *FTC v. Brown & Williamson Tobacco Corp.* held that the FTC cannot make the Cambridge Filter Method compulsory upon tobacco companies. The Court does not read *Brown & Williamson* so broadly. In *Brown & Williamson*, the D.C. Circuit considered a district court's permanent injunction requiring Brown & Williamson to obtain prior approval for using test results obtained from a testing system other than the FTC Method in cigarette advertisements.[9] *See Brown & Williamson*, 778 F.2d at 37. The Court first adopted the district court's finding that the FTC Method did not accurately measure Barclay cigarettes, but concluded that the use of a non-FTC sanctioned method, even with a disclaimer, would be deceptive and misleading. *See Brown & Williamson*, 778 F.2d at 41-43, 45 n. 7. In the portion of the opinion relied upon by Plaintiffs, the district court discusses whether prior FTC approval of non-FTC-Method advertisements amounts to a prior restraint in violation of the First Amendment. The court states:

> There is a problem, however, in the fact that, these safeguards notwithstanding, the injunction places the

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[9] The litigation giving rise to this injunction was an outgrowth of the FTC's efforts, at the request of competing cigarette manufacturers, to obtain accurate tar and nicotine ratings of Brown & Williamson's Barclay cigarettes. *See infra* at 8-9.

burden on B & W to justify the advertisement of results from a different system of testing which it considers superior to the FTC system, even if B & W includes a prominent disclaimer explaining that the rating comes from a new system not comparable to that used by the FTC and other manufacturers. Because the FTC has not adopted its system of testing pursuant to a Trade Regulation Rule under section 18 of the FTC Act, 15 U.S.C. § 57a(1982), one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette.

If B & W sought to advertise the results of a different system solely with respect to Barclay, this objection would be groundless. If the different system produces results not comparable to the FTC ratings used by other manufacturers, an advertisement displaying only that system's results for Barclay would have an inherent tendency to deceive, even with an explanatory disclaimer. The sole utility of any particular milligram rating is in comparison with the analogous ratings of other cigarettes. Thus, standing alone, the Barclay rating from a new system would tend to encourage comparison with the inapposite FTC ratings advertised by other manufacturers. This would tend to deceive consumers.

The injunction as written, however, would even prohibit B & W from devising a new testing system and, in advertising its results for Barclay, providing information about competing brands prominently enough and in sufficient quantity to allow consumers to make informed decisions without confusing figures from disparate testing systems. Since this would eliminate consumer confusion, we believe that the FTC must bear the affirmative burden of demonstrating any inadequacy, and thus deceptiveness, of the results obtained under such a system and advertised in the manner described. We do not wish to leave intact the injunction's requirement of prior FTC ap-

> proval of such advertising because that would enshrine the current FTC system as the sole legitimate testing method, even though it was not passed pursuant to section 18 of the FTC Act, 15 U .S.C. § 57a (1982), and subjected to the possibility of judicial review. Thus we remand this case to the district court with instructions to modify the injunction to allow for the presentation of the results of a different testing system, so long as any advertisement of such results provides sufficient data to avoid deceptiveness due to confusion with the FTC testing system. It hardly requires saying that the FTC would remain free to prove deceptiveness due to the inadequacy of the new testing system or the form of the advertisements under section 5 of the FTC Act. The Commission may, of course, address the problem by promulgating a Trade Regulation Rule under section 18 of the Act.

Brown & Williamson, 778 F.2d at 44-45.

The D.C. Circuit's holding was based on its belief that requiring prior FTC approval of cigarette advertisements referencing a different testing system but providing information about competing brands for consumer comparison of tar and nicotine values would constitute an unlawful prior restraint on speech. This holding does not mean that a cigarette company is not "acting under the direction of a federal officer" when it advertises cigarettes in accordance with the FTC prescribed method. Rather, the D.C. Circuit's opinion merely freed Brown & Williamson from having to obtain prior approval if it chose to deviate from the FTC's advertising standards. *Brown & Williamson* did not disturb the FTC provided safe harbor for cigarette manufacturers disclosing tar and nicotine values on the FTC Method in advertisements. The FTC made clear to such manufacturers that their actions would not be construed as deceptive under 15 U.S.C. § 45(a). Although a Trade Regulation Rule would fortify the FTC Method disclosure

requirement,[10] lack of a formal rule does not deprive cigarette manufacturers utilizing the FTC method to measure tar and nicotine and to advertise their products from the protection of the federal officer removal statute.

This Court believes it would be reading § 1442 far too technically if it concluded that a company may only act under the direction of a federal officer where a formal rule is issued. Formal rulemaking may be one of the principal ways federal agencies regulate, but it is clearly not the only way. In the FTC's case, it is not even the preferred way to regulate the cigarette industry. Given the number and complexity of federal programs and the variety of ways in which federal agencies bring about actions in private industries, this Court cannot say that a formal rule is the only way in which the FTC's interaction with Philip Morris would trigger application of § 1442. The manner in which the FTC has overseen cigarette testing and advertising for the past four decades and has compelled adherence to the FTC Method is sufficient to invoke federal court jurisdiction pursuant to the federal officer removal statute.

D. Contrary Authority

This Court reaches its conclusion fully aware that two other federal district courts have considered this precise issue and have reached the opposite conclusion, holding that Philip Morris could not remove "lights" class action suits under § 1442(a)(1). *See Tremblay v. Philip Morris*, 231 F.Supp.2d 411 (D.N.H.2002); *Pearson v. Philip Morris*, Case No. 03-CV-178-HA (D.Oreg. August 8, 2003). Plaintiffs' allegations here appear to be virtually identical to those raised by the Plaintiffs in *Tremblay* and *Pearson*.

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[10] By the terms of *Brown & Williamson*, a formal Trade Regulation Rule would also allow the FTC to place a constitutional prior restraint on advertisements that did not use the method. *See Brown & Williamson*, 778 F.2d at 45. Absent such a rule, the FTC is still free to regulate such advertisements, but must do so by enforcing the deceptive practices provision of 15 U.S.C. § 45(a) through compliance actions and compelled consent orders. This, of course, is the FTC's preferred way of regulating.

Tremblay, 231 F.Supp.2d at 413; *Pearson* at 2. After carefully considering the issue, this Court simply finds itself in disagreement with the holdings of *Tremblay* and *Pearson*.

The *Tremblay* Court concluded:

> Nowhere in the complaint do the plaintiffs challenge the enforcement or wisdom of any FTC policy, procedure or regulation. Further, the complaint does not allege that Philip Morris is liable simply for complying with the Cambridge Filter Method and FTC advertising policies. Rather, it clearly and concisely alleges that Philip Morris engages in a course of conduct aimed at manipulating the FTC's policies by exploiting loopholes in the Cambridge Filter Method. Because the plaintiffs are the masters of their complaint, [citation omitted], Philip Morris's attempted recasting of their claims is irrelevant.
>
> In short, this is not a case where plaintiffs seek to challenge federal policy or official action in a state court forum. Rather, the plaintiffs challenge the conduct of a private corporation, acting without direction from a federal officer or agency. Allowing this action to be litigated in state court will not interfere with the course of the FTC's duties nor its policies regarding the regulation of the cigarette industry.

Tremblay, 231 F.Supp.2d at 419. The *Pearson* court essentially adopted the reasoning of *Tremblay*. However, in reaching its decision, the *Pearson* court relied more heavily on the lack of a formal rule requiring use of the FTC Method.

This Court has concluded otherwise. Philip Morris' adherence to the FTC mandated method cannot be divorced from the tar and nicotine values assigned to its cigarettes and used, as the FTC requires, in advertisements for those cigarettes. The FTC's lengthy and detailed involvement in the way cigarettes are tested and advertised – all pursuant to its legislative mandate – amounts to more than "underlying facts used by plaintiffs to support their allegations." *See Pearson* at 10. Though no formal rule was ever

promulgated, the FTC's actions are so pervasive that they rise to the level comprehended by § 1442(a). As this Court has already stated, the fact that Philip Morris is free to design its cigarettes as it wishes does not diminish the federal direction under which Philip Morris tests and advertises those cigarettes. Given that the FTC has directed use of the Cambridge Filter Method for four decades, the inadequacies of the tar and nicotine values derived from application of the Method cannot be the sole result of Philip Morris' actions. Plaintiffs' allegations, though articulated in terms of Philip Morris' manipulative intent, squarely confront the FTC's policy that cigarette testing and advertising using the FTC Method does not violate 15 U.S.C. 45(a), but that all other testing is suspect. Although Plaintiffs are masters of their Complaint, § 1442 contemplates federal jurisdiction when a plaintiff's claims challenge private action taken at the direction of the federal government. Such is the case here. Since inadequacies in FTC policies are at the heart of Plaintiffs' complaint, this is the type of action for which § 1442 provides federal jurisdiction.

E. Judicial Estoppel

The Court rejects Plaintiffs' argument that judicial estoppel prevents Philip Morris from arguing that federal officer removal is appropriate. Judicial estoppel bars a party from taking "clearly inconsistent" positions in litigation. *See New Hampshire v. Maine*, 532 U.S. 742, 750-1, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); *Hossaini v. W. Mo. Med. Ctr.*, 140 F.3d 1140, 1142-1143 (8th Cir. 1998). The Eighth Circuit has commented that judicial estoppel is limited to situations "tantamount to a knowing misrepresentation to or even fraud on the court." *See Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 738 n. 6 (8th Cir.1987). Plaintiffs contend that judicial estoppel applies because Philip Morris' position in *Brown v. Philip Morris, Inc.*, 250 F.3d 789 (3d Cir.2001) directly contradicts the position that Philip Morris has taken in this litigation.

The *Brown* plaintiffs claimed that Philip Morris violated their rights under color of federal law by targeting adver-

tising of mentholated tobacco products to African Americans.[11] Philip Morris successfully argued that it could not be sued under *Bivens* because it was not a state actor. Determining whether a party is a state actor for purposes of applying constitutional protection is completely different than determining whether a party is "acting under the direction" of a federal officer sufficient to invoke federal jurisdiction under 28 U.S.C. § 1442. The Court agrees with the Defendant that "judicial estoppel simply does not apply where a change in a party's position arises from differences in the legal standards relevant to the underlying actions." *See* Defendant's Memorandum in Opposition to Plaintiff's Motion to Remand at 5; *see also Sumner v. Michelin N. Am., Inc.*, 966 F.Supp. 1567, 1573-76 (M.D.Ala.1997); *Holder v. Holder*, 305 F.3d 854, 872 (9th Cir.2002); *Johnson v. Or. Dep't of Human Res.*, 141 F.3d 1361, 1367 (9th Cir. 1998). Philip Morris is certainly not committing a "fraud on the court" by arguing that it is not a state actor in a *Bivens* action, but arguing that it is acting under the direction of the FTC in the instant case. *See Total Petroleum, Inc.*, 822 F.2d at 738 n. 6.

IV. Conclusion

This Court concludes that Philip Morris acted under the direction of the FTC in relying on Cambridge Filter Method tar and nicotine ratings to advertise its Marlboro Lights and Cambridge Lights cigarettes and in disclosing those ratings in such advertisements. Therefore, this Court has jurisdiction of this matter under 28 U.S.C. § 1442(a). For these reasons, described more fully above, the Court denies Plaintiffs' motion to remand to state court. Having so held, the Court also denies Plaintiffs' request for attorney fees and costs.

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[11] This action was premised on *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *Bivens* held that violation of the Fourth Amendment by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.

V. Interlocutory Appeal Certification

The Court has discretion to allow Plaintiffs to seek an interlocutory appeal of this order. To do so, the court must consider the requirements of 28 U.S.C. § 1292(b), which states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

Certification is appropriate only when the district court is "of the opinion that": (1) the order "involves a controlling question of law"; (2) "there is a substantial ground for difference of opinion"; and (3) certification will "materially advance the ultimate termination of the litigation." *See White v. Nix*, 43 F.3d 374, 377 (8th Cir.1994).

An order denying a motion to remand a case to the state court from which the case was removed may be certified for interlocutory appeal. *See* 9 James W. Moore, Moore's Federal Practice ¶ 110.22[2], at 271-72 (2d ed. 1996). Several circuits have considered interlocutory appeals of such orders. *See Sonoco Products Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 368 (4th Cir. 2003); *Grant v. Chevron Phillips Chemical Co.*, 309 F.3d 864, 866 (5th Cir. 2002); *Lee v. American Nat. Ins. Co.*, 260 F.3d 997, 999 (9th Cir. 2001); *S.G. v. American National Red Cross*, 938

F.2d 1494, 1495-96 (1st Cir. 1991), *reversed on other grounds by American National Red Cross v. S.G.*, 505 U.S. 247, 249, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992); *Elston Inv. Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436 (7th Cir. 1984). The U.S. Supreme Court has considered U.S. Court of Appeals decisions reversing, on § 1292(b) appeals, Federal District Court orders refusing to remand removed actions. *See Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 346, 119 S.Ct. 1322, 143 L.Ed.2d 448 (1999); *American National Red Cross v. S.G.*, 505 U.S. 247, 249, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992). Although this Court could not locate an Eighth Circuit case reviewing a district court's denial of a motion to remand, it located one case implying that such a procedure provides a basis for interlocutory appeal. *See Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1240 (8th Cir. 1995) (noting appellate court could not consider district court denial of motion to remand where district court refused Plaintiff's request to certify order for interlocutory appeal).

This Court finds that all three elements required by § 1292(b) are present in this case. The central question considered in whether Philip Morris may remove this lawsuit to federal court under 28 U.S.C. § 1442(a)? The presence of a controlling question of law in this particular order is especially clear. The dispositive question for jurisdictional purposes is whether, given the FTC's regulation of cigarette testing and advertising (which is not in dispute), Philip Morris was acting under the direction of a federal officer as that phrase is used in 28 U.S.C. § 1442(a). The facts surrounding the FTC's involvement with cigarette testing and advertising are not in dispute. This question is purely a legal one.

Additionally, substantial grounds for disagreement with the Court's ruling exist. The Court's decision is directly contrary to the only other federal district court cases that have considered the very same issue. The decisions in *Tremblay* and *Pearson* could not be considered on appeal because 28 U.S.C. § 1447(d) prevents U.S. Courts of Appeal from considering a district court's order remanding a

case to state court on jurisdictional grounds. *See Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 126-127. This is so even where a remand order is certified for interlocutory appeal under § 1292(b). *Id.* at 129-130. Further, several other motions to remand removed proposed "Lights" class actions relying on § 1442(a) are pending in federal courts across the country. *See Arnold v. Philip Morris USA*, Case No. 03-403-MJR (S.D.Ill.); *Paldrmic v. Altria Corp. Services*, Case No. 03-C-649 (E.D.Wisc.); *Piscetta v. Philip Morris, Inc.*, Case No. 03-CV-1337-RLV (N.D.Ga.); *Stern v. Philip Morris USA*, Case No. 03cv2556; *Virden v. Altria Group, Inc.*, Case No. 5:03-CV-61 (N.D.Va.).

Finally, certification will "materially advance the termination of this litigation." A strong consideration in considering a § 1292(b) petition is the policy of "minimizing the total burdens of litigation on parties and the judicial system by accelerating or at least simplifying trial court proceedings." *See* 16 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3930, p. 439 (2d. ed.1995). That goal would be advanced here.

This Court concludes that certification of the question posed in the Plaintiffs' motion to remand for interlocutory appeal is appropriate. The Court therefore certifies the controlling question of this order – May Philip Morris remove this lawsuit to federal court under 28 U.S.C. § 1442(a)? – for interlocutory appeal. The Court is mindful that § 1292(b) should only be used in "exceptional cases," but believes that this is one of those cases in which interlocutory appeal could avoid "protracted and expensive litigation." *See White*, 43 F.3d 374 at 376. Therefore, if Plaintiffs so choose, they shall have the statutorily enumerated ten days in which to file an application for interlocutory review with the Eighth Circuit Court of Appeals.[12]

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[12] Failure to file such application within the ten day period would result in loss of the right to petition for interlocutory appellate consideration. *See Jones v. Goodyear Tire & Rubber Co.*, 967 F.2d 514, 516 (11th Cir. 1992).

In this event, Plaintiffs shall also notify this court. To avoid expensive and burdensome proceedings in the district court, the Court orders that the filing of an application for interlocutory appeal with the Eighth Circuit Court of Appeals and notice thereof to this court shall stay the proceedings in this court until the question posed on this interlocutory appeal is adjudicated or the application is rejected.

IT IS THEREFORE ORDERED that the Plaintiffs' Motion to Remand (Doc. # 2) be, and it is hereby, DENIED.

IT IS FURTHER ORDERED that the Plaintiffs' request for costs and fees (Contained in Doc # 2) be, and it is hereby, DENIED.

IT IS FURTHER ORDERED that the controlling question of this case, as stated above, be and it is hereby, DESIGNATED FOR INTERLOCUTORY APPEAL under § 1292(b). The Plaintiffs shall have ten days to file an application for interlocutory review with the Court of Appeals for the Eighth Circuit. Upon filing of such an application, proceedings in this Court will be stayed pending either the outcome of the Eighth Circuit review of the question posed or rejection of the application.

IT IS FURTHER ORDERED that the date on which Defendants' response to Plaintiffs' Motion for Class Certification is due shall be extended. If the stay contemplated above comes into effect, Defendants' response to Plaintiffs' Motion for Class Certification need not be filed until 14 days after Eighth Circuit final action upon Plaintiff's application for interlocutory appeal. If Plaintiffs do not seek interlocutory appeal, Defendants' response is due no later than 14 days after the expiration of the ten day period in which Plaintiffs have to file an application for interlocutory review.

Dated this 12th day of December, 2003.

/s/ Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1225

LISA WATSON, ET AL.,
Appellants,

v.

PHILIP MORRIS COMPANIES, INC., ET AL.,
Appellees.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Arnold and Judge Bye would grant the petition for rehearing en banc.

(5128-010199)

November 18, 2005

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE CIRCUIT COURT
PULASKI COUNTY, ARKANSAS

Case No. CV03-4661

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION, AND PHILIP MORRIS INCORPORATED, A CORPORATION,
Defendants.

[Filed May 29, 2003]

FIRST AMENDED CLASS ACTION COMPLAINT

COMES NOW Plaintiffs, on behalf of themselves and all other similarly situated, by and through their undersigned attorneys, and for their First Amended Class Action Complaint state:

1. Plaintiff Lisa Watson is, and was at all relevant times, residing in Pulaski County, Arkansas.

2. Plaintiff Loretta Lawson is, and was at all relevant times, residing in Pulaski County, Arkansas.

3. Defendant Philip Morris Companies, Inc. ("Philip Morris") is a Virginia corporation with its principal place of business at 120 Park Avenue, New York, NY. At all times relevant hereto, Philip Morris, through its wholly owned subsidiary Philip Morris Incorporated, engaged in the business of manufacturing, promoting, marketing, distributing, and selling Cambridge Lights and Marlboro Lights brand cigarettes. Philip Morris transacts business in Pulaski County, Arkansas, and in all states throughout the United States and at all relevant times manufactured,

promoted, marketed, distributed, and/or sold cigarettes in Arkansas and in all states throughout the United States. Defendant Philip Morris has significant contacts with Pulaski County and the activities complained of herein occurred, in whole or in part, in Pulaski County, Arkansas.

4. Defendant Philip Morris Incorporated ("PMI" or the "subsidiary") is a Virginia corporation with its principal place of business at 120 Park Avenue, New York, NY. PMI is a wholly owned subsidiary of Philip Morris. PMI is a foreign for profit corporation in good standing registered to do business in Arkansas. Its agent for service is The Corporation Company, 425 West Capitol Avenue, Suite 1700, Little Rock, AR 72201. At all times relevant hereto, PMI engaged in the business of manufacturing, promoting, marketing, distributing and selling Cambridge Lights and Marlboro Lights brand cigarettes. PMI transacts business in Pulaski County, Arkansas, and at all times relevant hereto manufactured, promoted, marketed, distributed, and/or sold cigarettes in Arkansas and in all states throughout the United States. Defendant PMI has significant contacts with Pulaski County and the activities complained of herein occurred, in whole or in part, in Pulaski County, Arkansas.

5. Jurisdiction is proper in this court.

6. Venue is proper in this court.

7. Defendants manufacture so-called "lowered tar" filtered cigarette under the brand names Cambridge Lights and Marlboro Lights. Defendants distribute and sell Cambridge Lights and Marlboro Lights in Pulaski County, Arkansas and throughout the State of Arkansas.

8. At all relevant times, Defendants sold and packaged Cambridge Lights and Marlboro Lights as "light" and as having decreased tar and nicotine.

9. While marketing and promoting decreased tar and nicotine deliveries, Defendants designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the "Cambridge" or "Ogg" testing apparatus – the testing machine used by the tobacco industry to

"measure" tar and nicotine levels in cigarettes – than would be delivered to the consumers of the product. Defendants controlled the tar and nicotine delivery of Cambridge Lights and Marlboro Lights cigarettes under machine testing conditions apparently to achieve support for their representations that their Cambridge Lights and Marlboro Lights cigarettes are "light" and contain decreased tar and nicotine and that their Marlboro Lights cigarettes contain "lowered tar and nicotine."

10. Defendants' representations that Cambridge Lights and Marlboro Lights cigarettes are "lighter" (i.e. lower tar and nicotine) than regular cigarettes are deceptive and misleading and constitute unfair business practices.

11. Not only do consumers receive higher levels of tar and nicotine than the testing apparatus registers, but the smoke produced by Cambridge Lights and Marlboro Lights is more mutagenic (causing genetic and chromosomal damage) per milligram of tar than 'regular' cigarettes.

12. Defendants engaged in a common course of unfair business practices and/or deceptive and unlawful conduct in connection with the manufacture, distribution, promotion, marketing, and sale of Cambridge Lights and Marlboro Lights cigarettes by:

a. Falsely and/or misleadingly representing that their product is "light" and/or delivers lowered tar and nicotine in comparison to regular cigarettes;

b. Describing the product as light when the so-called lowered tar and nicotine deliveries depended on deceptive changes in cigarette design and composition that dilute the tar and nicotine content of smoke per puff as measured by the industry standard testing apparatus, but not when used by the consumer;

c. Intentionally manipulating the design and content of Cambridge Lights and Marlboro Lights cigarettes in order to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and

nicotine. These manipulations include, but are not limited to, the modification of tobacco blend, weight, rod length, and circumference; the use of reconstituted tobacco sheets and/or expanded tobacco; and the increase of smoke pH levels by chemical processing and additives, such as ammonia, which resulted in the delivery of greater amounts of tar and nicotine when smoked under actual conditions than Defendants represent by use of the "light" description;

d. Employing techniques that purportedly reduce machine-measured levels of tar and nicotine in Cambridge Lights and Marlboro Lights cigarettes, while actually increasing the harmful biological effects, including mutagenicity (genetic and chromosomal damage) caused by the tar ingested by the consumer per milligram of nicotine.

13. Through longstanding fraudulent and unfair conduct, Defendants willfully deceived consumers, including the Plaintiffs named herein, regarding the nature and effect of their "light" cigarettes.

14. Plaintiff Lisa Watson has purchased and consumed (on average) approximately one and a half packs of Marlboro Lights cigarettes per day for approximately six years. Plaintiff was without knowledge of the conduct by Defendants alleged in this Complaint, or of any facts from which it might reasonably be concluded that Defendants were so acting, or which would have lead to the discovery of such action, until early 2000.

15. Plaintiff Loretta Lawson has purchased and consumed (on average) approximately one pack of Marlboro Lights cigarettes per day for approximately seven years. Plaintiff was without knowledge of the conduct by Defendants alleged in this Complaint, or of any facts from which it might reasonably be concluded that Defendants were so acting, or which would have lead to the discovery of such action, until early 2000.

16. Defendants have unfairly and unjustly profited from the deceptive and misleading representations regarding their so-called "light" cigarettes.

Class Action Allegations

17. Plaintiffs bring this action as a Class Action against Defendants pursuant to § 4-88-107 *et seq.*, of the Arkansas Deceptive Trade Practices Act individually and on behalf of a Class consisting of all persons who purchased Defendants' Cambridge Lights and Marlboro Lights cigarettes in Arkansas for personal consumption.

18. The Class period commences on the first date the Defendants placed their Cambridge Lights and Marlboro Lights cigarettes into the stream of commerce through the date the Court certifies this suit as a Class Action.

19. Excluded from the putative Class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this cause.

20. Plaintiffs are members of the Class and they will fairly and adequately assert and protect the interests of the Class. The interests of the Plaintiffs are coincident with, and not antagonistic to, those of other members of the Class. Plaintiffs have retained attorneys who are experienced in Class Action litigation.

21. Members of the Class are so numerous that joinder of all members is impracticable. Upon information and belief, there are millions of members of the Class whose identities can be ascertained from the records and files of Defendants and from other sources.

22. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

a. Whether Defendants misrepresented the actual tar and nicotine delivery to consumers of "light" ciga-

rettes they manufactured, marketed, and/or distributed;

b. Whether Defendants intentionally designed "light" cigarettes to register misleading tar and nicotine measurements on the testing apparatus utilized by the tobacco industry while delivering significantly higher quantities of tar and nicotine to human smokers;

c. Whether the Defendants violated the Arkansas Deceptive Trade Practices Act through their course of unfair and/or deceptive conduct as alleged herein;

d. Whether Defendants' conduct in violation of the Arkansas Deceptive Trade Practices Act was willful and wanton;

e. Whether the Defendants were unjustly enriched at the expense of the Class Members; and

f. Whether the Class has been damaged and, if so, the extent of such damages.

23. The prosecution of separate actions by individual members of the Class would create a risk of:

a. Inconsistent or varying adjudications with respect to individual members of the Class; and

b. Adjudication with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

24. The Class Action method is appropriate for the fair and efficient prosecution on of this action.

25. Individual litigation of all claims which might be assessed by all Class Members would produce such a multiplicity of cases that the judicial system having jurisdiction of the claims would remain congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising out of the conduct of Defendants.

26. The certification of a Class would allow litigation of claims that, in view of the expense of the litigation, may be insufficient in amount of damages to allow prosecution separate, individual actions.

27. Accordingly, Plaintiff brings this action on behalf of themselves and on behalf of all other members of the Class defined as follows:

> All persons who purchased Defendants' Marlboro Lights and Cambridge Lights cigarettes in Arkansas for personal consumption, from the first date that the Defendants sold Marlboro Lights and Cambridge Lights in Arkansas through the date the Class is certified.
>
> Excluded from the Class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants, or employees of Defendants, and the immediate family members of such persons. Also excluded is any trial judge who may preside over this cause.

COUNT I

COMES NOW Plaintiffs and for Count I of their Complaint against Defendants PHILIP MORRIS COMPANIES, INC., and PHILIP MORRIS INCORPORATED alleges:

28. Plaintiffs Lisa Watson and Loretta Lawson restate and reallege the allegations contained in Paragraphs 1 through 27 as if fully set out herein.

29. The acts of Defendants constitute violations of the Arkansas Deceptive Trade Practices Act, § 4-88-107 *et seq.*

30. At all times relevant hereto, Plaintiffs and Defendants PHILIP MORRIS COMPANIES, INC., and PHILIP MORRIS INCORPORATED were "persons" within the meaning of § 4-88-102(4).

31. At all times relevant hereto, Plaintiffs and members of the Class were consumers within the meaning of § 4-88-107 and applicable case law.

32. At all times material hereto, Defendants PHILIP MORRIS COMPANIES, INC., and MORRIS INCORPORATED conducted trade and commerce and sold goods within the meaning of § 4-88-107.

33. The Arkansas Deceptive Trade Practices Act, § 4-88-107(a) provides in pertinent part:

> Deceptive and unconscionable trade practices generally:
>
> (1) Knowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services, or as to whether g1oods [*sic*] are original or new, or of a particular standard, quality, grade, style, or model;
>
> (10) Engaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade.

34. Beginning with the first date that Defendants placed their Cambridge Lights and Marlboro Lights cigarettes into the stream of commerce and continuing through the present, Defendants, individually and/or jointly, by and through their employees, agents and/or brokers, engaged in misrepresentations, unlawful schemes and courses of conduct intended to induce the Plaintiffs and members of the Class to purchase Defendants' Cambridge Lights and Marlboro Lights cigarettes through one or more of the following unfair and/or deceptive acts and/or practices:

a. Falsely and/or misleading representation that their product is "light" and/or delivers "lowered tar and nicotine" in comparison to regular cigarettes;

b. Designing cigarettes to register lowered tar and nicotine levels under machine testing conditions while actually delivering higher levels of the compounds when smoked by consumers, thereby rendering the "light" product descriptor deceptive and misleading;

c. Placing ventilation holes on the filter of light cigarettes that are covered or blocked by the smoker's

lips or fingers under normal use, thereby negating the represented effects of the light brand;

d. Manipulating the nicotine levels in their light cigarettes;

e. Employing techniques that purportedly reduce machine-measured levels of tar in their Cambridge Lights and Marlboro Lights cigarettes, including increased air dilution through the use of ventilation holes in or near the filter, but which actually increase the mutagenicity (genetic and chromosomal damage) of tar delivered to the consumer and thereby increase the levels of harmful toxins per milligram of nicotine by the consumer; and

f. Manipulating the design of their Cambridge Lights and Marlboro Lights cigarettes, including but not limited to, modifying the tobacco blend, weight, rod length and circumference; increasing smoke pH levels by chemical processing and additives, such as ammonia, in such a way that resulted in delivery of greater amounts of tar and nicotine when smoked under actual conditions than Defendants represent by use of the "light" product descriptor.

35. The facts which Defendants misrepresented as alleged in the preceding paragraph were material in that they concerned facts that would have been important to a reasonable consumer in making a decision whether to purchase Cambridge Lights and/or Marlboro Lights cigarettes.

36. Defendants' conduct as alleged in paragraph 34 was unfair in that (1) it offended public policy; (2) it was immoral, unethical, oppressive, or unscrupulous; and/or (3) it caused substantial economic injury to consumers, namely Plaintiff.

37. Defendants' "unfair" and/or deceptive acts and/or practices alleged in the preceeding paragraph occurred in connection with Defendants' conduct of trade and commerce in Arkansas.

38. Defendants intended for Plaintiffs and members of the Class to purchase Defendants' Cambridge Lights and Marlboro Lights cigarettes in reliance upon Defendants' unfair and/or deceptive acts and/or practices in the marketing and sale of their Cambridge Lights and Marlboro Lights cigarettes.

39. Defendants' unfair and/or deceptive acts and/or practices were committed with willful and wanton disregard for whether or not Plaintiffs and members of the Class would actually receive less tar and nicotine than they would have from a regular cigarette.

40. Defendants' unfair and/or deceptive acts and/or practices violate the Arkansas Deceptive Trade Practices Act, § 4-88-107.

41. As a direct and proximate result of the Defendants' unfair and/or deceptive acts and/or practices, Plaintiffs and members of the Class were damaged in that Plaintiffs and members of the Class did not receive "light" (lower tar and nicotine) cigarettes when they purchased Marlboro Lights cigarettes.

42. Plaintiffs and members of the Class have suffered actual damages in an amount to be proven at trial, but less than $75,000 per plaintiff or Class Member, including all compensatory damages, punitive damages, attorneys' fees and costs.

COUNT II

COMES NOW Plaintiffs Lisa Watson and Loretta Lawson and for Count II of their Complaint against Defendants PHILIP MORRIS COMPANIES, INC., and PHILIP MORRIS INCORPORATED alleges:

43. Plaintiffs Lisa Watson and Loretta Lawson reallege the allegations contained in paragraphs 1 through 42 as if fully set out herein.

44. As stated with more particularly above, Defendants embarked on and carried out a common scheme of marketing and selling light cigarettes by falsely and deceptively representing that the cigarettes were "Lights," or contained "lowered tar and nicotine."

45. Defendants' practices resulted in Plaintiffs and members of the Class purchasing light cigarettes in order to receive a low tar, low nicotine alternative to regular cigarettes, but not getting the perceived benefits of less tar and nicotine than regular cigarettes.

46. Defendants' practices further resulted in Plaintiffs and members of the Class purchasing light cigarettes without understanding the true nature of Defendants' product or that Defendants manipulated their Cambridge Lights and Marlboro Lights cigarettes to increase their own ill-gotten profits.

47. The monies paid by Plaintiffs and members of the Class to Defendants in the purchase of Cambridge Lights and Marlboro Lights cigarettes conferred substantial benefits upon Defendants. Defendants knew of and appreciated the benefits conferred upon them by Plaintiffs and the Class and accepted and retained these benefits, which, injustice and fairness, should be refunded and paid over to Plaintiffs and members of the Class in an amount to be proven at trial but less than $75,000 per Plaintiff or Class Member.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants PHILIP MORRIS COMPANIES, INC., and PHILIP MORRIS INCORPORATED as follows:

A. Ordering that this action be maintained as a Class Action, pursuant to Ark. R. Civ. P. 23 and the following Class be certified:

> All persons who purchased Defendants' Marlboro Lights and Cambridge Lights cigarettes in Arkansas for personal consumption, from the first date that the Defendants sold Marlboro Lights and Cambridge Lights in Arkansas through the date this Class is certified.
>
> Excluded from the Class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as wall as the officers, directors, agents, servants, or employees of Defendants, and the immedi-

ate family members of such persons. Also excluded is any trial judge who may preside over this cause.

B. Awarding Plaintiff and members of the Class compensatory damages, punitive damages, costs of suit, and attorneys' fees in an amount less than $75,000 per Plaintiff or Class Member.

C. Plaintiffs and members of the Class demand a jury trial on the issues.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Case No. 4:03-CV-519 GTE

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., AND PHILIP MORRIS INCORPORATED,
Defendants.

[Filed July 2, 2003]

NOTICE OF REMOVAL

Defendant Philip Morris USA Inc. (hereinafter, "PM USA") (sued as "Philip Morris Incorporated") hereby gives notice of removal of the civil action captioned *Watson v. Philip Morris*, Case No. CV03-4661, from the Circuit Court, Pulaski County to the United States District Court for the Eastern District of Arkansas. PM USA files this notice of removal pursuant to 28 U.S.C. §§ 1331, 1441(a)(1) and 1446.

As grounds for removal, PM USA states as follows:

1. PM USA received a copy of the complaint on June 3, 2003. The only other named defendant, Philip Morris Companies Inc. (now known as "Altria Group, Inc."), has not been served with the complaint.

2. This notice of removal is filed within thirty days of receipt by PM USA of the complaint. Removal is therefore timely pursuant to 28 U.S.C. § 1446(b).

3. PM USA has not pled, answered, or otherwise appeared in the state court action.

4. Written notice of the filing of this Notice of Removal and of the removal of this action has been delivered to all parties through their counsel of record. A copy of the Notice of Removal will be filed promptly with the Clerk of the Court of the Circuit Court, Pulaski County, Arkansas.

5. Removal is proper under 28 U.S.C. § 1442(a)(1)'s federal officer provision, for the reasons stated below in ¶¶ 6-51, and because the Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331, as described in ¶¶ 52-59 below.

FEDERAL OFFICER REMOVAL

6. Plaintiff brings a putative class action on behalf of all persons who purchased Cambridge Lights and Marlboro Lights cigarettes in Arkansas. Compl. at ¶ 27. At the heart of plaintiff's complaint is the Federal Trade Commission's ("FTC") mandated testing system for measuring tar and nicotine yields for all cigarettes (including Marlboro Lights and Cambridge Lights). According to plaintiffs, the FTC's "testing apparatus" produces inaccurate results regarding levels of tar and nicotine and the mutagenicity of the smoke inhaled by Cambridge Lights and Marlboro Lights smokers: "Not only do consumers receive higher levels of tar and nicotine than the testing apparatus registers, but the smoke produced by Cambridge Lights and Marlboro Lights is more mutagenic . . . per milligram than 'regular' cigarettes." *Id.* at ¶ 11. Plaintiffs contend that PM USA's compliance with FTC testing requirements "resulted in Plaintiffs and members of the Class purchasing light cigarettes in order to receive low tar, low nicotine alternative to regular cigarettes, but not getting the perceived benefits of less tar and nicotine than regular cigarettes." *Id.* at ¶ 45.

7. Plaintiffs allege that defendants engaged in misconduct by "representing that their product is 'light' and/or deliver lowered tar and nicotine in comparison to 'regular' cigarettes." *Id.* at ¶ 12(a). Plaintiffs premise liability on the contention that tar and nicotine content of

smoke per puff is diluted when measured by the "industry standard testing apparatus" as compared to when cigarettes are smoked by consumers. *Id.* at ¶ 12(b).

8. The FTC, however, directed PM USA to determine tar and nicotine yields by using the very method that plaintiff assert is misleading and should give rise to liability. Removal is therefore proper pursuant to 28 U.S.C. § 1442(a)(1), which provides in relevant part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office.

9. Section 1442(a)(1) provides a private party with the right to remove to federal court where it is sued for actions taken under the direction of a federal officer. As numerous courts – including courts in this Circuits – have made clear, "the right of removal conferred by § 1442(a)(1) is to be broadly construed," and thus "[t]he Supreme Court has explicitly endorsed a broad reading of § 1442 rather than 'a narrow, grudging interpretation.'" *Ferrell v. Yarberry*, 848 F. Supp. 121, 122 (E.D. Ark. 1994) (quoting *Arizona v. Manypenny*, 451 U.S. 232 (1981)); *Hardge-Harris v. Pleban*, 741 F. Supp. 764, 771 (E.D. Mo. 1990); *see also Kolibash v. Comm. on Legal Ethics of the West Virginia Bar*, 872 F.2d 571, 576 (4th Cir. 1989); *Nationwide Investors v. Miller*, 793 F.2d 1044, 1045-46 (9th Cir. 1986) (per curiam) (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)); *Swett v. Schenk*, 792 F.2d 1447, 1450 (9th Cir. 1986) (same); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998) (same); *Puerto Rico v. Casillas*, 624 F. Supp. 822, 826 (D.R.P. 1985) ("Section 1442 receives a liberal construction."); *514*

Citizens & Taxpayers v. Fecteau, 269 F. Supp. 769, 770 (D.N.H. 1966) ("In order to effectuate the propose of this statute, it must be liberally construed."). Underlying this broad application of section 1442(a)(1) is a concern "that state court suits against corporations [acting under the direction of federal officers] could be a direct interference with the implementation of federal law." *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 946 (E.D.N.Y. 1992); *see also Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 487 (1st Cir. 1989) ("Section 1442(a)(1) represent[s] a legislatively-spawned value judgment that a federal forum should be available when particular litigation implicates a cognizable federal interest").

10. Courts have articulated a four-prong test to determine whether removal under section 1442(a)(1) is proper. Under this test, the removing party must show that:

- it "acted under the direction of a federal officer";
- it can "raise a federal defense to plaintiff's claims";
- it can "demonstrate a causal nexus between plaintiff's claims and acts it performed under color of federal office";
- it is a "person" within the meaning of the statute.

Pack v. AC and S, Inc., 838 F. Supp. 1099, 1101 (D. Md. 1993); *Fung v. Abex Corp.*, 816 F. Supp. 569, 571-72 (N.D. Cal. 1992).

A. FTC's Tar and Nicotine Program

11. The long history of the FTC's extensive involvement in the subject matter of this lawsuit establishes that these four requirements are met here. The FTC has required without exception that its standardized testing method be used in measuring tar and nicotine and that its method must form the basis for all communications regarding tar and nicotine levels.

1. Beginnings of the FTC's Tar and Nicotine Program

12. The FTC has broad regulatory and enforcement powers over cigarette advertising and has not hesitated to

exercise these powers. In addition to the FTC's general authority to prevent deceptive advertising practices, Congress has ensured through the Federal Cigarette Labeling & Advertising Act, 15 U.S.C. § 1331 *et seq.* (FCLAA), that the FTC has extensive authority to monitor and regulate virtually all aspects of cigarette advertising. FCLAA requires the FTC to report annually to Congress regarding the advertising and promotion of cigarettes. 15 U.S.C. 1337(b) (requiring annual reports). And FCLAA specifically provides that the FTC retains authority "with respect to unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. § 1336. As the Supreme Court has explained, these provisions make clear that "to the extent that Congress contemplated additional targeted regulation of cigarette advertising" beyond those specific regulations set forth in FCLAA, "it vested that authority in the FTC." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 548 (2001).

13. The FTC began its involvement in tar and nicotine measurements and disclosures as early as the 1940s.

14. Between 1941 and 1950, the FTC investigated and prosecuted complaints against at least four major tobacco companies for advertising the tar or nicotine content of cigarettes. *See, e.g., In re Benson & Hedges*, 33 F.T.C. 1659 (1941); *In re R.J. Reynolds*, 46 F.T.C. 706 (1950); *In re P. Lorillard*, 46 F.T.C. 735 (1950); *In re Am. Tobacco*, 1951 F.T.C. LEXIS 61 (1951) *In re P. Lorillard*, No. 7692, 1959 U.S. App. LEXIS 5376 (1959).

15. In September 1955, the FTC followed up this litigation by issuing the Cigarette Advertising Guides and directing the tobacco companies to follow the guidelines. Among other things, the 1955 Guides barred the tobacco companies from claiming that "any brand of cigarettes or the smoke therefrom is low in nicotine or tars, or contains less, nicotine [or] tars . . . than any other brand or brands of cigarettes when it has not been established by competent scientific proof at the time of dissemination that the claim is true." 1955 Cigarette Advertising Guides, Trade Regulation Reporter ¶ 39,012 at 41,602 (CCH 1995).

16. In December 1959, the FTC directed the tobacco industry to cease making any representations of "low or reduced tar" on the ground that they were health claims. As the chairman of the FTC subsequently explained, the FTC would take action to enforce this directive:

> [The Guides] constituted, in effect, informal advice and guidance to industry with respect to the regulatory posture which the Commission had reason to believe would be established as a basis for issuance of complaints, and subsequent proceedings under Section 5(B) of the Federal Trade Commission Act. . . .
>
> In 1960, then, the Commission was informing the industry that in its opinion the evidence then available would support a complaint against any marketer who made any reference to tar and nicotine content, charging that such a reference was false and misleading.

Letter from Chairman Paul Rand Dixon to the Honorable Warren G. Magnuson at 2-3 (April 11, 1966).

2. Establishment of the FTC's Testing Program

17. In the 1960s, the FTC's prohibition of all tar and nicotine advertising came under substantial criticism from the public health community, which was beginning to recommend reductions in tar and nicotine levels as a possible means of reducing the risks of smoking.

18. Based on the recommendations of the public health community, in March 1966, the FTC reversed its position regarding the disclosure and advertising of tar and nicotine levels. The FTC directed each of the major tobacco manufacturers (including PM USA) that "a factual statement of the tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette would not be in violation" of the 1955 Guides. 1955 Cigarette Advertising Guidelines, Trade Regulation .Reporter ¶ 39,012, at 41,603 (CCH 1995). The Commission subsequently explained that this decision to "augment information available to the public on the tar and nicotine content of cigarettes" was "[b]ased on the proposition that lower

yield cigarettes present a lessened hazard to the American public." 1968 FTC Report to Congress Pursuant to the FCLAA at 17.

19. At the same time, however, the FTC took action to ensure that all tar and nicotine measurements were based on a standardized, uniform testing method established and maintained by the government. The FTC directed that cigarette manufacturers could disclose only those tar and nicotine measurements that were "supported by adequate records of tests conducted in accordance with the Cambridge Filter Method." 1955 Cigarette Advertising Guidelines, Trade Regulation Reporter ¶ 39,012, at 41,603 (CCH 1995). The Commission admonished that "statements or representations" of tar and nicotine content "based on non-standardized tests having no official or governmental sanction would tend to confuse and mislead the public." Letter from Joseph W. Shea to Howard H. Bell at 3 (Oct. 25, 1967). As the FTC subsequently explained, its "tar and nicotine testing program was intended to provide smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to chose [*sic*] among the then-existing brands." 1997 FTC Annual Report to Congress Pursuant to the FCLAA at 4.

20. Accordingly, the FTC issued a notice seeking comment as to "what action, if any, should be taken in the public interest with respect to modifying or amplifying the Cambridge Filter Method" and announced that it would hold a hearing on the subject. Methods to Be Employed in Determining Tar and Nicotine Content; Notice of Public Hearing, 31 Fed. Reg. 14278 (Nov. 4, 1966). Members of the tobacco industry (including PM USA) made a submission specifically warning of the limitations of the FTC's proposed testing methodology:

> The [Cambridge] Method does *not* measure the *volume* of smoke – or the PM ["particulate matter"] or nicotine in the volume of smoke – that any *human being* will draw from smoking any particular cigarette.

> Each smoking characteristic is leveled or averaged out by the standard method.
>
> No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion . . .
>
> The [Cambridge] Method does not and cannot measure these many variations in human smoking habits.

Supplemental Observations Following November 30, 1966 Hearing Before the Federal Trade Commission at 2-3 (emphasis in original).

21. Notwithstanding the recognized limitations in the method, the FTC directed that the Cambridge method be retained as the only allowable method for measuring tar and nicotine. The method subsequently became known as the "FTC method," and has formed the centerpiece of the FTC's entire tar and nicotine program.

22. On August 1, 1967, the FTC "issu[ed] directions to its staff" in the *Federal Register* "to commence the first formal test" of tar and nicotine measurements under its new standardized methodology. Testing for Tar and Nicotine Content, 32 Fed. Reg. 11178 (Aug. 1, 1967). The FTC dictated the precise testing conditions to be used, including:

1. Smoke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 23 mm.,
2. Base results on a test of 100 cigarettes per brand, or type,
3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection,"
4. Determine particulate matter on a "dry" basis employing the gas chromatography method . . . to determine the moisture content,
5. Determine and report the "tar" content after subtracting moisture and alkaloids as nicotine from the particulate matter,

6. Report tar content to the nearest whole milligram and nicotine content to the nearest 1/l 0 milligrams.

Id.

23. Testing began in the FTC's own laboratories in 1967 – four years before Marlboro Lights were introduced on the market. This is the only instance in the Commission's history in which it has conducted in-house testing of a consumer product.

24. At the same time that it began formal testing the FTC issued a press release announcing the adoption of its testing program and explaining its decision. The FTC again directed that its testing method was the only one to be used in measuring tar and nicotine: "the public interest requires that all test results presented to the public be based on a uniform method" because "use of more than one testing method . . . would only serve to confuse or mislead the public." "FTC To Begin Cigarette Testing," FTC Press Release at 1-2 (Aug. 1, 1967). The Commission explained that it adopted the Cambridge method to be the "uniform method" because it provides a "reasonable standardized method" that was "capable of being presented to the public in a manner that is readily understandable." *Id.* at 1. Finally, the FTC promised that it would "continue evaluating its tests, and on that basis may determine in the future to change the number of cigarettes tested or any other testing procedures as may be found necessary." *Id.* at 2-3.

25. In addition to conducting the testing in its own laboratory, the FTC also publicly reported the results of its testing. Publication of FTC official tar and nicotine ratings began in 1967. Since then, the FTC has published its official tar and nicotine ratings on a periodic basis in the *Federal Register* and in the free-standing Tar and Nicotine Report.

3. Transfer of Testing Responsibility to the Industry

26. The FTC continued to conduct tar and nicotine measurements in its own laboratories until 1987. At that

point, the FTC ordered the Tobacco Institute Testing Laboratory ("TITL") – an industry-funded laboratory – to assume responsibility for the tar and nicotine measurements.

27. In transferring measurement responsibility to the industry, the FTC insisted on maintaining strict control over every detail of the testing process. The FTC gave TITL no discretion whatever in conducting the test; the FTC dictated the precise conditions of the testing. The Commission required that all TITL test results must be reported to the Commission by sworn affidavit, thereby subjecting any inaccurate reporting to penalties of perjury. And the FTC retained the right to conduct unlimited inspections of TITL laboratories to ensure that the industry's testing properly adhered to the FTC's precise specifications.

4. Reconsideration of the FTC Method

28. Since adopting its tar and nicotine measurement program in 1967, the FTC has continually re-evaluated the propriety of its system. On each occasion, the FTC's re-assessment was prompted by concerns regarding the limitations of its method for predicting the actual levels of tar and nicotine that are delivered to individual smokers. On each occasion, the FTC requested and received comments from a number of prominent scientists and public health authorities. And on each occasion, the FTC directed that the testing program be retained and refused to allow the use of any other testing method. As a result, the FTC requires the same standard to be used today.

29. As the FTC has explained in deciding to retain its existing system: "[a]lthough smokers may not smoke precisely like the FTC machine, by using standardized smoking parameters the FTC ratings provide an *objective* and *comparative* basis for assessing the amount of "tar" and nicotine a smoker will get from different cigarettes if that person smokes each cigarette in the same way." Federal Trade Commission's Trial Brief, *Federal Trade Commission v. Brown & Williamson Tobacco Corp.*, Civil Action

No. 83-1940, in the United States District Court for the District of Columbia (Sept. 12, 1983) at 5-6 (emphasis in original).

30. Moreover, at times the FTC has specifically determined that there was scientific evidence supporting the retention of its testing system. For example, as the FTC's Bureau of Consumer Protection has explained, the FTC declined to revise its method after a 1983 investigation in light of existing epidemiologic evidence suggesting that the testing system had value in predicting lung cancer risk for smokers:

> [T]here was no clear consensus as to specific action the Commission could (or should) take to eliminate the limitations of the test method. At the same time, *abandoning the testing system without instituting another method of tar testing would have been premature because then-current epidemiologic evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that had occurred since the 1950s.*

C. Lee Peeler, "Cigarette Testing and the Federal Trade Commission: A Historical Overview," in *Monograph 7: The FTC Cigarette Test Method for Determining, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes* at 7 (1996) (emphasis added).

31. Thus, based on careful considerations of the available evidence, the FTC has repeatedly required the industry to use the FTC method as the standardized procedure for measuring tar and nicotine yields. And the FTC has repeatedly made clear that *only* the FTC method should be used. For instance, as the FTC direct in a letter to one tobacco manufacturer, "it would be deceptive to advertise a tar-figure which is higher than the latest applicable FTC tar figure. . . . tar values which are set forth in cigarette advertisements must be consistent with the latest applicable FTC tar number." Letter from Carol M. Thomas to Michael I. Gastman (Sept. 26, 1978).

5. Tar and Nicotine Disclosures

32. The FTC's tar and nicotine testing program also has provided the basis for the FTC's directions regarding communications with the public about tar and nicotine levels.

a. Requiring Tar and Nicotine Disclosures

33. By 1960, the FTC had reached an agreement with the industry prohibiting tar and nicotine disclosures. In 1966, the FTC reversed this ban and directed that disclosures would be permissible so long as the measurements were determined by the FTC's own testing system. *See supra* at ¶ 18.

34. Three years after beginning its testing program, the FTC went a step further and proposed a trade rule requiring the disclosure of tar and nicotine ratings in cigarette advertisements. In justifying its proposal, the FTC explained that "responsible medical opinion indicates that the reduction of tar and nicotine content in cigarette smoke decreases the hazard to the health" and thus "[t]o promote the public interest, advertisers should not be discouraged from promoting these varieties which rank low in tar and nicotine." 1970 FTC Report to Congress Pursuant to the Public Health Cigarette Smoking Act at 14. The FTC believed that requiring tar disclosures would "lead those smokers who are unable to kick the habit to greater interest in obtaining a low tar and nicotine cigarette" and would encourage "competition among the cigarette companies to meet that interest." *Id.* at 15.

35. After proposing this regulation, the FTC sent a letter to the tobacco industry indicating its determination "to explore . . . the possibility of reaching an agreement with all of the cigarette manufacturers on the inclusion of a statement of tar and nicotine contents in cigarette advertising," so long as the agreement would include an "effective method of insuring compliance with the terms of any agreement." Letter from FTC to Horace R. Kornegay (Sept. 16, 1970). In response, five major tobacco manufacturers (including PM USA) submitted a written plan to

the FTC agreeing require tar and nicotine disclosures in advertising, and the FTC suspended its proposed trade rule indefinitely. Thus FTC determined that relying on the industry's plan to mandate tar and nicotine disclosures would free its resources to pursue other matters, and at the same time made clear that it would return to the proposed trade rule if necessary to ensure that tar and nicotine disclosures were required:

> It appears to be in the public interest to afford the tobacco industry an opportunity to implement the letter and spirit of the amended plan which it has proposed. In taking this action, the Commission is retaining the unconditional right to reschedule the trade regulation rule proceedings and to take any other action relating to this subject at any time it deems such action to be necessary, or desirable in the public interest.
>
> The Commission believes that if the amended plan operates satisfactorily, the Commission will be able to employ substantial manpower and funds which would otherwise have been devoted to hearings and court proceedings to dealing with the serious problems relating to cigarette advertising.

1970 FTC Report to Congress Pursuant to the Public Health Cigarette Smoking Act at 19 (quoting Dec. 22, 1970 press release, Appendix D).

36. As a result of this agreement, PM USA has been required to include tar and nicotine disclosures in all advertising for its cigarettes.

b. FTC's Consideration of Descriptors

37. The FTC's formal testing program – and the tar and nicotine measurements that the testing program generates – also have formed the basis of the FTC's directions regarding the use of descriptors such as "low tar."

38. As early as 1968 – only one year after it commenced its testing program – the FTC began to classify "low" yield cigarettes as those with less than 15 mg of tar as measured by its own testing program. Since then, the FTC has directed that this 15 mg dividing line should

serve as the formal definition of a "low tar" cigarette: "The FTC formally defines a low 'tar' cigarette as one that has 15.0 or less milligrams of 'tar.'" FTC Staff Report, Cigarette Advertising Investigation at 1-50 n. 175 (May 1981); *see also* 1979 FTC Report to Congress at 11; 1980 Report to Congress at 18.

39. In addition, the FTC deliberately decided to allow the tobacco manufacturers to use descriptors such as "low tar," but only under certain defined conditions. The tobacco companies could use descriptors only if the terms were based on the FTC's mandated testing methodology.

40. For example, in 1969, the FTC issued a complaint against American Brands for its advertisements of Pall Mall Gold cigarettes. American Brands claimed that Pall Mall Gold were "lower in tar than ever before. Lower in tar than the best selling filter king . . . the average puff gives you 26% less 'tar' than a non-filter cigarette." *In re Am. Brands*, 79 F.T.C. 255, 257 (1971). The FTC determined that these claims were false and deceptive because Pall Mall Gold cigarettes fell within the middle of its tar and nicotine rankings. *Id.* at 256-57. The investigation ultimately resulted in the entry of a consent order with American Brands. In this consent decree, the FTC mandated that the manufacturer could use terms such as "low," 'lower," "reduced," and "like qualifying terms," so long as the statement was "accompanied by a clear and conspicuous disclosure of . . . the 'tar' and nicotine content in milligrams in the smoke produced by the advertised cigarette." *Id.* at 258-59.

41. The FTC reaffirmed this decision in a 1994 consent agreement with American Tobacco. In 1994, the FTC challenged American's Carlton advertisements, which represented that "consumers will get less tar by smoking 10 packs of Carlton than by smoking a single pack of the other brands shown in the ads, each of which was rated as having more than 10 milligrams of tar per cigarette." *In the Matter of the American Tobacco Company*, Docket No. C-3547, Order and Complaint (Jan. 3, 1995). The Commission found that these advertisements were deceptive

and entered into a consent agreement with American Tobacco prohibiting such comparative claims. *Id.* At the same time, however, the FTC specifically determined that American Tobacco could make "express or implied representation[s] . . . that [its] brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine." *Id.*

* * *

42. In view of the FTC's mandated tar and nicotine program, PM USA satisfies each of the four prongs necessary for federal officer removal, as discussed below.

B. PM USA Acted Under the Direction of the FTC

43. To satisfy the "acting under" prong, the removing party must generally show that the federal official exercised "'direct and detailed control' over the defendant." *Fung*, 816 F. Supp. at 572 (citation omitted); *see also Pack v. AC and S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993) (same). Such "control" can be "satisfied by strong government intervention and the threat that a defendant will be sued in state court 'based upon actions taken pursuant to federal direction.'" *Fung*, 816 F. Supp. at 572 (citation omitted). Although merely "participat[ing] in a regulated industry" is typically not sufficient, courts have permitted removal where the defendants, were "governed by 'exceedingly complex regulations, guidelines, and evaluation schemes.'" *Id.* (quoting *Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*, 358 F. Supp. 841 (S.D.N.Y. 1973)); *see also Ryan*, 781 F. Supp. at 947 (removal proper where based on "showing that the particular conduct being sued upon is closely linked to detailed and specific regulations") (citing *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 144-45 (E.D.N.Y. 1991)).

44. The 60-year history of FTC mandates discussed above illustrates the FTC's "strong government intervention" and its exercise of "direct and detailed control" over PM USA with respect to tar and nicotine measurements and disclosures. *Fung*, 816 F. Supp. at 572. As explained above (*see supra* at ¶¶ 6-7), the basis for all of plaintiff's allegations is their contention that the FTC Method inac-

curately measures the tar and nicotine content of "light" cigarettes. Compl. at ¶¶ 11, 12(b), 45. Plaintiff's allegations directed at the use of descriptors such as "light" are also inextricably intertwined with the purported failings of the FTC method: if the tar end nicotine ratings that form the basis of these descriptors were accurate, there would be no basis for plaintiff's claims that PM USA misrepresented Marlboro Lights to be "light."

45. These supposedly flawed tar and nicotine ratings were determined, not as a result of a discretionary decision by PM USA or any other tobacco company, but rather as a direct result of the FTC's mandates. The FTC established the testing system for measuring tar and nicotine, including specifying in great detail the parameters that were to be used. *See supra* at ¶¶ 19-24. The FTC reevaluated the propriety of its testing program in the face of the same criticisms that plaintiff raise in their complaint and specifically decided to retain the existing system. *See supra* at ¶¶ 28-31. The FTC initially conducted the tests in its own laboratories, and even when it finally transferred measurement responsibility to the industry, retained complete oversight to ensure that the tests were conducted according to its precise specifications. *See supra* at ¶¶ 23-27. The FTC made clear that it would be deceptive to use a measurement that was generated by a different system, even if the alternate method produced higher ratings. *See supra* at 24, 31. And the FTC directed that its testing method could form the basis for communications with consumers regarding the amount of tar and nicotine in cigarettes. *See supra* at ¶¶ 32-41. This exercise of control is more than sufficient to establish that PM USA acted under the direction of the FTC for purposes of removal.[1]

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[1] *But see Tremblay v. Philip Morris, Inc.*, 231 F. Supp. 2d 411 (D.N.H. 2002). In *Tremblay*, the court remanded a similar putative class action brought on behalf of smokers of Marlboro Light and Marlboro Ultralight. Although the court did not find that PM USA was acting under the direction of the FTC, the court recognized that the FTC had "endorsed the use of the Cambridge Filter Method," and its

C. PM USA Has a "Federal Defense" to Plaintiff's Claims

46. PM USA can easily establish that it has a colorable federal defense to plaintiff's claims. This second prong is not particularly stringent: "The defendant need not prove that he will actually prevail on his federal immunity defense in order to obtain removal; indeed, one of the most important reasons for removal is to have the validity of the [federal] defense of official immunity tried in a federal court." *Jamison v. Wiley*, 14 F.3d 222, 238 (4th Cir. 1994); *see also Pack*, 838 F. Supp. at 1103; *Arness*, 997 F. Supp. at 1272; *Fung*, 816 F. Supp. at 573. Thus, the "defense need only be plausible; its ultimate validity is not to be determined at the time of removal." *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424, 1427 (11th Cir. 1996).

47. As illustrated by the FTC's long-standing tar and nicotine testing program, the Commission has made a series of deliberate policy judgments regarding the measurement and disclosure of tar and nicotine levels. For example, the FTC has made a clear policy determination that a standardized testing regime for tar and nicotine measurements is necessary; the FTC has defined the precise parameters of the testing method to be used; and the FTC has mandated that those measurements form the basis for all communications with consumers about tar and nicotine levels. *See supra* at ¶¶ 17-41. Underlying all

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ruling at least implied that the result might have been different if plaintiff there were deemed to have challenged the legitimacy of the FTC's testing program: "[n]owhere in the complaint do the plaintiff challenge the enforcement or wisdom of any FTC policy, procedure or regulation." *Id.* at 418-19. PM USA respectfully submits that *Tremblay* is incorrectly decided because the court there failed to recognize the extent to which plaintiff's claims necessarily challenged the decisions and policies underlying the FTC mandates in its tar and nicotine program. In any event, here it is clear from the face of the complaint that plaintiff's claims depend on the alleged faults of the FTC's testing system. *See, e.g.*, Compl. ¶¶ 9, 11, 12, 22(b), 34 (alleging FTC testing system registered lower levels of tar and nicotine than delivered to smokers).

of these decisions was the FTC's judgment that it was necessary to "augment information available to the public on the tar and nicotine content of cigarettes" based on "the proposition that lower yield cigarettes present a lessened hazard to the American public." 1968 FTC Report to Congress at 17.

48. These policy determinations are precisely what plaintiff challenge in their complaint; plaintiff essentially seek to hold defendants liable for adhering to the directions of the FTC's tar and nicotine program. In fact, to avoid liability under the theories expressed in plaintiff's complaint, PM USA would have had to acted directly contrary to the FTC's mandate and policies by launching a campaign publicly criticizing the failings of the FTC method and possibly even use an alternate test method. Plaintiff's claims thus inevitably conflict with the FTC's policy judgments, giving rise to a valid preemption defense. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (finding state law preempted by conflict with deliberate policy judgment of a federal agency).

D. There Is a Causal Connection Between Plaintiff's Claims and the Acts Performed Under the Direction of the FTC

49. PM USA can also establish the requisite causal connection between plaintiff's claims and the actions taken at the direction of the FTC. This third prong is not particularly stringent either. As the Supreme Court has explained, the "causal connection" test is met as long as the claims arise as a consequence of the defendant's carrying out official tasks and duties, regardless of whether those duties are actually required by federal law. *Mesa v. California*, 489 U.S. 121, 131-32 (1989). In fact, the causality standard is sufficiently broad that it can be satisfied even if the defendant is mistaken about the scope of its duty: "[section 1442(a)(1)] does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis,

though mistaken or false, of the state prosecution." *Id.* at 132 (internal quotation and citation omitted).

50. Here, as discussed above, plaintiff seek to assess liability for conduct – such as the use of the FTC's allegedly faulty tar and nicotine ratings – that was undertaken at the express direction of a federal agency. But for PM USA's adherence to the FTC's testing system, there would be no lawsuit. This is more than sufficient to satisfy the casual connection prong.

E. PM USA Is a "Person" Within the Meaning of Section 1442(a)(1)

51. Courts nationwide have recognized that corporations, no less than any other persons implementing federal policies, are entitled to the protection of the federal officer removal statute. *See, e.g., Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 418 (5th Cir. 2001); *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989); *Peterson v. Blue Cross/Blue Shield*, 508 F.2d 55, 58 (5th Cir. 1975); *Pack v. AC & S, Inc.*, 838 F. Supp. 1099, 1102-03 (D. Md. 1993); *Blackman v. Asbestos Defendants*, 1997 WL 703773, at *2 (N.D. Cal. 1997); *Ruffin v. Armco Steel Corp.*, 959 F. Supp. 770, 773 (S.D. Tex. 1997); *Overly v. Raybestos-Manhattan*, 1996 WL 532150, at *2 (N.D. Cal. 1996); *Good v. Armstrong World Indus.*, 914 F. Supp. 1125, 1127-28 (E.D. Pa. 1996); *Crocker v. Borden*, 852 F. Supp. 1322, 1325 (E.D. La. 1994); *Bahrs v. Hughes Aircraft Co.*, 795 F. Supp. 965, 968-69 (D. Az. 1992); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992); *Bakalis v. Crossland Savings Bank*, 781 F. Supp. 140, 144 (E.D.N.Y. 1991). Because a "purely legal person such as a corporation could be engaged in activities that amount to the implementation of a federal policy under the direction of a government officer," corporations must be treated as "persons" for purposes of federal officer removal, or else the purpose of the statute would be frustrated. *Ryan*, 781 F. Supp. at 946.

SUBSTANTIAL FEDERAL QUESTION JURISDICTION

52. This Court may also properly exercise federal question jurisdiction over plaintiff's claims pursuant to 28 U.S.C. § 1331.

53. Generally, "[t]he presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). "[I]t is an independent corollary of the well-pleaded complaint rule," however, that "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 22 (1983). Thus, regardless of whether a plaintiff's complaint on its face asserts only state causes of action, removal is proper where the lawsuit implicates a substantial federal question. *Ayres v. General Motors Co.*, 234 F.3d 514, 517-18 (11th Cir. 2000); *see also Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799 (4th Cir. 1996); *In re Wileless Telephone Radio Frequency Emissions Products Liab. Litig.*, 216 F. Supp. 2d 474 (D. Md. 2002).

54. For example, in a case analogous to the instant action, the District of Maryland exercised jurisdiction over an action against cell phone manufacturers that "alleg[ed] that defendants have negligently and fraudulently endangered the consuming public by providing wireless phones without headsets, knowing that these phones emit unsafe levels of radio frequency ('RF') radiation." *Wireless Telephone Radio Frequency Emissions Products Liab. Litig.*, 216 F. Supp. 2d 474, 479 (D. Md. 2002). The court began with a lengthy examination of the environment in which cell phone manufacturers operated, focusing in particular on the Federal Communications Commission's (FCC) exercise of regulatory authority over radiation levels in cell phones. The court noted that the FCC, after extensive consultation with various scientific experts, had set guidelines for acceptable radiation levels in cell phones. *Id.* at

483-87. In addition, the FCC had "already considered and rejected a headset requirement." *Id.* at 489.

55. With this environment in mind, the *Wireless Telephone* court had little difficulty in finding a substantial federal question sufficient for jurisdictional purposes. Although none of the claims "explicitly challenge[d] the FCC's radiation exposure guidelines," the court nevertheless recognized that the claims all inherently depended on the alleged faults in the FCC's guidelines: "the true gravamen of these complaints is to attack the lack of a headset requirement under the federal RF safety rules." *Id.* at 488. The court found that the federal interest was substantial because of the need for a uniform federal approach in determining acceptable cell phone radiation levels: "the risk of fifty different states articulating fifty different rules about whether and to what extent they may set RF safety standards could create market instability and prevent the maintenance of an unimpeded national network of rapid and efficient telecommunications service, a goal of significant importance to national commerce and security." *Id.* at 491. This risk of varying state standards was particularly important given that "one of the FCC's overriding goals is to design cellular service in a manner that will achieve nationwide compatibility." *Id.* at 483.

56. In short, "the central premise" of the *Wireless Telephone* plaintiff's claims was "that federal safety regulations governing wireless hand-held phones permit the sale of a product that is unreasonably dangerous to consumers," and thus plaintiffs could not prevail "without a court evaluating the validity and sufficiency of the federal standards." *Id.* at 491. The cell phone manufacturers had "the right to have such an evaluation take place in federal court," and removal was proper. *Id.* at 492; *see also Bryan v. BellSouth Telecommunications, Inc.*, 2003 WL 262333, *4 (M.D.N.C. 2003) (to extent plaintiff's claims challenged validity of FCC regulations relating to tariff collections, "these claims necessarily raise a substantial federal question over which federal courts may properly exercise jurisdiction").

57. The same reasoning is equally applicable to plaintiff's claims here. As discussed above, the "true gravamen" of the complaint here is "to attack" the FTC's measurement program. 216 F. Supp. 2d at 488. Plaintiffs specifically challenges the FTC testing method in their complaint, alleging that method is not accurate, Compl. at ¶¶ 11, 12(b), 45, and thus the "tar and nicotine yields" are "dilute[d]." *Id.* at ¶ 12(b). To prevail on their claims, plaintiffs must establish that the FTC method is misleading; if FTC ratings accurately reflect differences in tar and nicotine deliveries between cigarette brands, their claims must fail. *See supra* at ¶¶ 32-41. Accordingly, the trier of fact will inevitably be forced to "evaluat[e] the validity and sufficiency of the [FTC's] standards," an evaluation that defendants have the right to "take place in federal court." *Wireless Telephone*, 216 F. Supp. 2d at 4.

58. Like *Wireless Telephone*, the "risk of fifty different states articulating fifty different rules" regarding the measurement and disclosure of tar and nicotine levels creates a federal interest that is "substantial" for jurisdictional purposes. *Id.* at 491. Like the FCC in *Wireless Telephone*, the FTC has made clear that its testing method must be the sole method used for tar and nicotine measurements and communications: "use of more than one testing method, would only serve to confuse or mislead the public." "FTC To Begin Cigarette Testing," FTC Press Release at 2 (Aug. 1, 1967); *see also id.* at 1-2 ("the public interest requires that all test results presented to the public be based on a uniform method"); Letter from Carol M. Thomas to Michael I. Gastman (Sept. 26, 1976) ("it would be deceptive to advertise a tar figure which is higher than the latest applicable FTC tar figure . . . tar values which are set forth in cigarette advertisements must be consistent with the latest applicable FTC tar number"). Permitting these claims to be resolved under state law would create the risk of fifty different states reaching fifty different determinations as to the appropriate tar and nicotine testing regime, creating the very con-

fusion and lack of uniformity that the FTC was attempting to avoid.[2]

59. Given that plaintiff's claims necessarily challenge the FTC's forty year tar and nicotine measurement program, a substantial federal question is implicated, and this Court may exercise jurisdiction.

CONCLUSION

60. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1442(a)(1) and 1331 for the reasons stated above.

61. PM USA hereby reserves the right to amend or supplement this Notice of Removal.

62. PM USA hereby reserves all defenses, including, without limitation, the defense of lack of personal jurisdiction.

63. PM USA is providing plaintiffs, by and through their counsel, written notice of the filing of this Notice of Removal as required by 28 U.S.C. § 1446(d). Further, PM USA is filing a copy of this Notice of Removal with the Clerk of the Circuit Court, Pulaski County, Arkansas.

64. Pursuant to 28 U.S.C. § 1446(a), PM USA hereby attaches as **Exhibit A** a copy of all process, pleadings and other orders served upon such Defendant in the state court proceeding.

DATED this 2nd day of July, 2003.

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[2] If anything, the basis for substantial federal question jurisdiction is even stronger here than in *Wireless Telephone*. There the FCC merely determined the standards for permissible radiation levels in cell phones and had no subsequent involvement. By contrast here, as described above, the FTC has gone a step further by initially conducting the measurement testing in its own laboratories and then directing the industry to continue the testing program under the FTC's precise specifications and close supervision. *See supra* at ¶¶ 9-27. This distinction also explains why the *Wireless Telephone* court's rejection of federal officer removal, 216 F. Supp. 2d at 499-500, has no application to this case.

Respectfully submitted,

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/s/ R.T. Beard
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STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1442 provides:

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

28 U.S.C. § 1443 provides:

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
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February 9, 2006

Mr. Curtis Layton Bowman
11311 Arcade Drive, Suite 200
P.O. Box 25438
Little Rock, AR 72212

Re: Lisa Watson, et al.
v. Philip Morris Companies, Inc., et al.
Application No. 05A725

Dear Mr. Bowman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Alito, who on February 9, 2006 extended the time to and including March 20, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ ANN MCCAMEY
Ann McCamey
Case Analyst

[attached notification list omitted]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
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March 14, 2006

Mr. Curtis Layton Bowman
11311 Arcade Drive, Suite 200
P.O. Box 25438
Little Rock, AR 72212

Re: Lisa Watson, et al.
v. Philip Morris Companies, Inc., et al.
Application No. 05A725

Dear Mr. Bowman:

The application for a further extension of time in the above-entitled case has been presented to Justice Alito, who on March 14, 2006 extended the time to and including April 17, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ ANN MCCAMEY
Ann McCamey
Case Analyst

[attached notification list omitted]

FILED
APR 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., AND PHILIP MORRIS INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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April 21, 2006

CORPORATE DISCLOSURE STATEMENT

Respondent makes the following corporate disclosure statements pursuant to Supreme Court Rule 29.6:

Respondent Philip Morris USA Inc. is a wholly-owned subsidiary of Altria Group, Inc.[1] Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

[1] Altria Group, Inc. (identified in plaintiffs' complaint and in the caption by its former name, Philip Morris Companies, Inc.) was never served process in plaintiffs' lawsuit and therefore is not a party to this appeal.

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INTRODUCTION

This case does not meet the Court's standards for review. There is no circuit conflict. In each of the six circuit court cases cited by petitioners, the court found that removal under 28 U.S.C. § 1442(a)(1) was proper. None of the cases disagreed with the reasoning in any other case or rejected the approach taken by the Eighth Circuit below. None of the cases even acknowledged any confusion in the case law. Rather, the cases reflect only different factual scenarios in which removal under § 1442(a)(1) may be invoked. And, because the six decisions do not purport to define the full reach of the removal statute, they do not create a conflict even by implication. Simply put, petitioners have attempted to manufacture a circuit conflict where none exists.

The Eighth Circuit's holding is not likely to be applied to other industries or other contexts. The Eighth Circuit reached its decision based on the "*unique*" and "*unusual*" facts with respect to the Federal Trade Commission's ("FTC") 40-year regulatory history over cigarettes, finding that "[t]he FTC involved itself in the tobacco industry to an *unprecedented* extent." Pet. App. 13a. (emphases added). As Judge Gruender emphasized in his concurrence, this is "a rare case" insofar as "the FTC's direction and control of the testing and marketing practices at issue is extraordinary." *Id.* at 18a. Furthermore, even in the context of tobacco litigation, the decision below will not apply to future class actions, given the enactment of the Class Action Fairness Act of 2005 ("CAFA"). CAFA (enacted after removal below) now provides an independent basis for removal of class actions such as this one.

In any event, other than the Eighth Circuit, no federal appeals court has addressed the availability of § 1442(a)(1) removal in the specific "lights" cigarette factual context presented by this case. Notably, the Seventh Circuit has recently granted interlocutory review in *Kelly v. Martin &*

Bayley, Inc., No. 06-8007 (7th Cir. Mar. 6, 2006) (reviewing 2006 WL 44183 (S.D. Ill. Jan. 9, 2006)), an individual lights cigarette case that raises the same issue regarding removal under § 1442(a)(1) as presented by this case. That development makes review by this Court of the application of § 1442(a)(1) to a "lights" case particularly premature.

As demonstrated below, this case does not warrant review because the holding below is correct, consistent with this Court's guidance concerning § 1442(a)(1), does not conflict with any other circuit court case, and is not likely to be applied beyond the unique factual context of the FTC's regulatory history at issue here.

STATEMENT OF THE CASE

A. History Of FTC Regulation

1. The FTC Method

For over 40 years, the FTC has exercised unprecedented detailed and direct control over the measurement and disclosure of cigarettes' tar and nicotine yields, including precisely what information the tobacco companies could and could not disclose to consumers in advertising.[2] The FTC itself initially measured tar and nicotine yields in its own lab, and now requires the tobacco companies to conduct the testing to detailed specifications under FTC supervision. As the Eighth Circuit noted, the record shows "comprehensive

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[2] The FTC has broad authority under the FTC Act, 15 U.S.C. § 45, to address deceptive advertising. Moreover, in the Federal Cigarette Labeling & Advertising Act ("Labeling Act"), 15 U.S.C. §§ 1331 *et seq.*, Congress specifically affirmed the FTC's regulatory authority with respect to cigarette advertising and even required the FTC to report annually to Congress relating to cigarette advertising practices. *See* 15 U.S.C. § 1336; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 548 (2001) ("to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC").

and detailed control," as the FTC has "involved itself in the tobacco industry to an unprecedented extent." Pet. App. 13a.

In the early 1950s, scientific studies linking cigarettes to cancer identified "tar" (the particulate matter in cigarette smoke other than nicotine) as the cause of the health problems associated with smoking. DA-1-3.[3] Manufacturers responded by making filtered cigarettes and by marketing cigarettes based on claims of lower tar and nicotine delivery. DA-4. The manufacturers, however, employed different methods to measure tar and nicotine yields, which made it difficult to compare claims. DA-4. Concerned that the claims were confusing, the FTC in 1959 directed the tobacco companies to cease making any representations regarding tar and nicotine yields. DA-4-6.

By 1966, the public health community was urging tobacco companies to develop reduced tar cigarettes and encouraging the FTC to lift its tar and nicotine advertising ban. DA-21; 31-36; 38-40. The FTC responded by developing its own test for measuring tar and nicotine yields (the "FTC Method") and making it the only permissible test for substantiating any advertising claim regarding tar and nicotine yields. Pet. App. 24a; DA-33; 37; 680; 685. The FTC specifically advised that the use of any other method as a basis for such claims would be deemed deceptive. DA-294-96; Pet. App. 24a. The FTC thus encouraged manufacturers to compete based on tar and nicotine yields, but only with reference to FTC Method results.

Before the FTC adopted the FTC Method, the scientific community and cigarette companies (including PM USA) advised the FTC that its method did not measure the actual amount of tar and nicotine that smokers would receive. Pet. App. 3a. The FTC responded that its method was not intended "to determine the amount of tar and nicotine inhaled

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[3] Citations to DA-xx are references to respondent Philip Morris USA's ("PM USA") Appendix, filed before the Eighth Circuit.

by any human smoker," but concluded that it provided a "standardized method" that consumers could use to compare cigarettes. DA-294-96; Pet. App. 3a.

The FTC established detailed testing specifications for its method, including how cigarettes must be gathered for testing, how they must be stored prior to testing, and how the testing machine itself must be operated. Pet. App. 8a; DA-37; 248; 294-96.[4] For the next 20 years, the FTC operated the testing lab itself. Pet. App. 3a; 9a; 13a; 26a-27a; 41a. In 1987, the FTC transferred testing to the tobacco companies, but retained unlimited monitoring and inspection rights to ensure complete conformity with its specifications. *Id.* at 9a; 26a-27a. PM USA must now submit FTC Method results to the FTC under penalty of perjury. *Id.* at 28a; 42a.

2. FTC Direction With Respect To The Disclosure Of Tar And Nicotine Yields

With the adoption of the FTC Method and the opening of the FTC's Tobacco Testing Laboratory, the FTC began publishing tar and nicotine yields of cigarette brands in the Federal Register and in its annual reports to Congress (pursuant to its statutory reporting obligation). Pet. App. 3a; 42a. In 1970, the FTC proposed a regulation requiring manufacturers to disclose tar and nicotine yields in all cigarette advertising, but suspended its rulemaking after "compell[ing]" the industry to reach an acceptable agreement imposing essentially the same requirements that would have

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[4] In particular, the FTC's testing method required the following: "(1) [s]moke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 23 mm., (2) [b]ase results on a test of 100 cigarettes per brand, or type, (3) [c]igarettes to be tested will be selected on a random basis, as opposed to 'weight selection,' (4) [d]etermine particulate matter on a 'dry' basis . . . to determine the moisture content, (5) [d]etermine and report the 'tar' content after subtracting moisture and alkaloids (as nicotine) from particulate matter, [and] (6) [r]eport tar content to the nearest whole milligram and nicotine content to the nearest 1/10 milligram." Pet. App. 8a.

been imposed by the proposed regulation. *Id.* at 10a-11a; *see also id.* at 3a; 25a; 41a. The agreement specified the precise language that the tobacco companies were required to use in disclosing tar and nicotine yields in all advertisements. *Id.* at 26a; 9a. Furthermore, the FTC directed that the disclosure of information about tar and nicotine measurements had to be substantiated by the FTC Method. *Id.* at 11a. The FTC repeated this direction even when a tobacco company in 1978 sought to claim tar and nicotine yields *higher* than those measured according to the FTC Method. *Id.* at 11a-12a.

The FTC has vigorously enforced its directive that the tobacco companies use the FTC Method. For example, in 1969, the FTC brought proceedings against a cigarette company for stating that certain brands were lower in tar when the claim was not substantiated by the FTC Method. DA-530-35. A 1971 decree resolving the case banned the use of descriptive terms such as "low," "lower," "reduced," or "like qualifying terms," unless the term was substantiated by the FTC Method. Pet. App. 15a. Contrary to petitioners' contentions, Petition for a Writ of Certiorari ("Pet.") at 28, the FTC also "formally defined" "low tar" cigarettes as those measuring 15 milligrams or less in tar according to the FTC Method. DA-31-36; Pet. App. 15a; 29a. More recently, in a similar consent decree reached in 1995, the FTC reaffirmed its requirement that information about tar and nicotine yields be substantiated based exclusively on FTC Method results. DA-624-26; Pet. App. 30a.

Since the adoption of its testing program, the FTC has repeatedly considered claims that the FTC Method was misleading and that tobacco companies should not be required to base all information about tar and nicotine yields on it. In 1977, for example, the FTC examined the claim that its measurements were misleading because some smokers might cover ventilation holes that are used on many cigarettes, including "lights," to dilute the smoke with air. Pet. App. 15a-16a; DA-352. In 1981, the FTC undertook a broad-based

study of low tar cigarettes and "compensatory smoking" -- *i.e.*, changes in smoking behavior (such as deeper puffs) that may accompany a switch to lower yield cigarettes. DA-307-21; 419-22; 423-25. And, in 1992, at the behest of a consumer group, the FTC launched an investigation focused specifically on whether terms like "lights" and "low tar" were deceptive. DA-708-806; 547-52.

Each time, the FTC decided to continue requiring the tobacco companies to disclose information regarding tar and nicotine yields and to use the FTC Method. It did so for two reasons. *First*, the FTC relied on studies showing that smokers of lower FTC-measured yield cigarettes had a lower risk of disease than smokers of higher yield cigarettes. DA-310-11; 320; 715. Thus, the FTC determined that, notwithstanding its limitations, the FTC Method provided consumers with meaningful information regarding the relative risks posed by different types of cigarettes. DA-698; 707. *Second*, the FTC retained its method because it provided a single standardized rating system that consumers could use to compare brands and on which competition could be based. DA-359-60.

In 1997, the FTC reopened its investigation of whether the term "lights" is deceptive to consumers and whether a new test methodology should be adopted. 62 Fed. Reg. 48,158 (Sept. 12, 1997). That investigation remains open. In the meantime, the FTC continues to require manufacturers to measure tar and nicotine yields by the FTC Method and report those measurements -- and only those measurements -- to the public. Pet. App. 34a; 43a.

B. The Complaint

In April 2003, petitioners filed this massive putative class action in Arkansas state court on behalf of all persons who purchased at least one pack of Marlboro Lights or Cambridge Lights (together, "Lights") in Arkansas over a 30-year period. Petitioners allege that PM USA violated the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §§ 4-88-107 *et seq.*, and has been unjustly enriched. Petitioners do not seek to recover for illnesses relating to smoking Lights. Instead, they seek purported economic damages in the form of a total or partial refund of the purchase price of Lights. Pet. App. 72a ¶ 47. Petitioners claim that they suffered a financial loss when they failed to receive a true "light" cigarette, even though Lights have always been priced the same as their full-flavored counterparts. *Id.* at 71a ¶ 41.

Petitioners do not dispute that Lights yield less tar and nicotine than full-flavor cigarettes when tested under the FTC Method. In fact, they agree that FTC Method results provide "support" for any such representation. *Id.* at 63a-64a ¶ 9. Nevertheless, petitioners claim that PM USA's use of low tar descriptors such as "lighter" or "lower tar" are "deceptive and misleading." *Id.* at 64a ¶ 10. Petitioners allege that Lights "register misleading tar and nicotine measurements" under the FTC Method, *id.* at 67a ¶ 22b, because "consumers receive higher levels of tar and nicotine than the testing apparatus registers." *Id.* at 64a ¶ 11. Thus, petitioners directly attack the validity of the FTC Method and PM USA's conduct in carrying out the FTC's directives to use the FTC Method and disseminate its results to consumers.

C. Removal And Decision

On July 2, 2003, PM USA timely removed petitioners' case to the U.S. District Court for the Eastern District of Arkansas, asserting that removal was proper under § 1442(a)(1), because petitioners' allegations challenged conduct taken under the direction of the FTC.

The district court (Eisele, J.) denied petitioners' motion for remand on December 12, 2003, finding jurisdiction under § 1442(a)(1) on an undisputed record. *See* Pet. App. 58a. The court certified its opinion for interlocutory review pursuant to 28 U.S.C. § 1292(b) and stayed the case pending appeal.

Contrary to petitioners' claims, the district court did not state that "its decision expanded the scope of § 1442(a)(1)." Pet. at 7; *see* Pet. App. 57a-60a. Nor did the district court recognize the circuit split that petitioners claim exists with respect to the "acting under" requirement. The court simply concluded that appellate review pursuant to § 1292(b) certification was appropriate because a few *district courts*, applying the same legal standard, had rejected removal in similar lights cases. Pet. App. 58a-59a.

D. The Eighth Circuit Decision

The Eighth Circuit accepted review and unanimously affirmed. The court applied the four-prong test established by this Court for determining whether removal under § 1442(a)(1) was appropriate: that the defendant "(1) act under the direction of a federal officer; (2) show a nexus or 'causal connection' between the alleged conduct and the official authority; (3) have a colorable federal defense; and (4) be a 'person' within the meaning of the statute." Pet. App. 4a (citing *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999); *Mesa v. California*, 489 U.S. 121, 125 (1989)). The court found each requirement satisfied.

First, relying on *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), the Eighth Circuit explained that "[w]hether a defendant is 'acting under' the direction of a federal officer depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." Pet. App. 6a. The court explained that "[m]ere participation in a regulated industry is insufficient to support

removal." *Id.* at 6a. Rather, the removing party must show that the federal officer provided a sufficiently high level of "control and direction." *Id.* at 8a.

Based on an examination of the FTC's regulatory history, the Eighth Circuit found a "level of compulsion that establishes that Philip Morris was indeed 'acting under' the direction of a federal officer." *Id.* at 10a. The court explained that the FTC, through its regulatory program, exercises "comprehensive, detailed regulation" and "ongoing monitoring" and that it "controls the delivery of tar and nicotine information to consumers." *Id.* at 13a.

Second, the Eighth Circuit found that PM USA had demonstrated the necessary causal connection between the FTC's direction and the allegations in the petitioners' complaint. *Id.* at 13a-16a. As the court summarized: "[w]hether Philip Morris's labeling of cigarettes as 'lights' is deceptive directly implicates the enforcement and wisdom of the FTC's tobacco policies." *Id.* at 15a.

Finally, although the petitioners did not contest the remaining two requirements, the Eighth Circuit "review[ed]" those requirements "for jurisdictional purposes." *Id.* at 17a. The court had "no hesitation in concluding that Philip Morris, in its Notice of Removal, has set forth a colorable federal defense" -- federal preemption. *Id.* The court also held that a corporation "can be a 'person' within the requirements of federal officer removal." *Id.* at 17a-18a.

In a separate concurring opinion, Judge Gruender explained that the court's decision would not apply to the typical participant "in a heavily regulated industry." *Id.* at 18a. This case was unique, he emphasized, because "[t]he FTC developed the [FTC Method], conducted the testing itself for twenty years before farming it out to the cigarette companies, threatened a deceptive advertising action if the method of testing deviated in the smallest way from the government-mandated method and controlled the disclosure of the results

throughout." *Id.* Judge Gruender stressed that "the FTC passed the function of performing the testing to the cigarette companies while allowing them no independent control of the process whatsoever." *Id.* Judge Gruender concluded that "this is a rare case in which federal officer jurisdiction is appropriate even in the absence of a contract, principal-agent relationship, or near employee relationship with the government." *Id.* at 18a-19a.

Petitioners thereafter petitioned for rehearing and rehearing *en banc*, which were denied. *Id.* at 61a.

REASONS FOR DENYING THE PETITION

This Court should deny review. All six circuit court cases cited by petitioners, as well as the Eighth Circuit below, upheld federal officer removal in a range of factual contexts, all of which involved a defendant being sued for actions that were subject to the direction, control, and supervision of federal officials carrying out official federal functions under federal law. None of the cases conflicts with any of the others; none of them conflicts with *Watson*. This is not a circuit conflict except in the imagination of petitioners. And, far from a conflict or even any confusion, the district court decisions reveal a remarkable consistency in defining the legal test for § 1442(a)(1) removal -- a test identical to the one the Eighth Circuit applied below.

Moreover, the Eighth Circuit's decision was based on a heavily fact-intensive examination of the "unique" and "unusual" facts relating to the FTC's regulatory history. As a result, this case will have no application beyond the tobacco context -- and at most limited application in the tobacco context, given the enactment of CAFA, which provides an independent basis for federal court jurisdiction over future class actions. In any event, the Eighth Circuit is the only circuit court to have addressed § 1442(a)(1) in the context of a tobacco case. The Seventh Circuit recently granted review

of a decision to allow removal under similar circumstances. That is enough, in and of itself, to make review by this Court at this time inappropriate.

Finally, this decision is entirely consistent with this Court's interpretation of § 1442(a)(1). Petitioners propose to limit the federal officer statute in a manner that conflicts with both this Court's guidance and the plain language of the statute.

I. THERE IS NO CIRCUIT CONFLICT

A. The Eighth Circuit's Decision Is Entirely Consistent With Other Circuit Court Decisions Applying § 1442(a)(1)

Petitioners attempt to manufacture a circuit conflict where none exists. They claim that the First, Seventh, and Eleventh Circuits apply an "official function" test, that the Fifth and Eighth Circuits apply a "comprehensive federal control" test, and that the Ninth and Tenth Circuits apply a "general supervision" test. Pet. at 10-17. These "tests" are made up for the petition. They do not appear in any of the six decisions that petitioners cite as evidence of the "deep division" among the courts of appeals.

In each case cited by petitioners, the circuit court found that removal was proper, and none purported to set out a legal test for removal contrary to the holding of any other circuit. Indeed, none of the cited decisions expressed disapproval of any other decision or even noted the existence of any confusion among the courts.

At bottom, the six cited cases reveal nothing more than different factual scenarios in which § 1442(a)(1) removal may be appropriate. The mere fact that the statute may apply to a range of different kinds of cases hardly constitutes a "conflict" justifying this Court's review.

For example, petitioners cite *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989), for the proposition that the First Circuit requires that the conduct

at issue have an "official character" before § 1442(a)(1) applies. Pet. at 10-11. But nowhere in the opinion did the First Circuit purport to adopt such a requirement. There, the defendants (telephone companies) invoked § 1442(a)(1) because they helped federal officials implement a duly authorized wiretap. The complaint expressly alleged that the defendants had acted under the orders, control, and directions of the federal officers. In upholding the removal, the First Circuit held only that such allegations were sufficient for purposes of invoking the statute. 868 F.2d at 486-87. The First Circuit did not address whether removal would be proper in other settings.

Venezia v. Robinson, 16 F.3d 209 (7th Cir.), *cert. denied*, 513 U.S. 815 (1994) (cited in Pet. at 11), involved a state officer participating in an FBI undercover sting operation. The Seventh Circuit held merely that removal was proper; as in *Camacho*, the court did not purport to consider under what other circumstances removal may be appropriate. *Id.* at 212.

In *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996) (cited in Pet. at 12), the Eleventh Circuit similarly found that a private party had properly invoked § 1442(a)(1). There, the private party was sued as an authorized agent of the Federal Aviation Administration. Again, as in *Camacho* and *Venezia*, the circuit court held only that such a circumstance was sufficient for removal. Notably, Judge Gibson -- who authored *Watson* -- served on the panel in *Magnin*. *See id.* at 1426 (sitting by designation). Judge Gibson gave no indication that he saw any conflict between the two decisions.

In the only case cited by petitioners even remotely analogous to the case here, *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999) (cited in Pet. at 13-14), the Fifth Circuit found § 1442(a)(1) removal proper, just as the Eighth Circuit did here. There, a plaintiff asserted product liability claims

against an Agent Orange manufacturer. The court found that the government specified the formula for Agent Orange, as well as its packaging, labeling, and shipping. *Id.* at 399. The government also inspected the labeling of the containers and compelled the manufacturer to deliver Agent Orange to it under threat of criminal sanctions. *Id.* at 399-400. The court concluded that the manufacturer had acted pursuant to federal direction. *Id.* at 400.

Finally, petitioners cite two unpublished cases from the Ninth and Tenth Circuits. Pet. at 16-17. In *California v. H&H Ship Service Co.*, No. 94-10182, 1995 WL 619293 (9th Cir. Oct. 17, 1995), the Ninth Circuit held that when a private party is hired to help the Coast Guard remove spills, the private party can invoke § 1442(a)(1). And in *Greene v. Citigroup Inc.*, No. 99-1030, 2000 WL 647190 (10th Cir. May 19, 2000), the Tenth Circuit similarly held that a private company implementing a remedy for clean up ordered by the Environmental Protection Agency can invoke § 1442(a)(1). Neither case is inconsistent with the Eighth Circuit decision. Nor did either case purport to limit removal under § 1442(a)(1) in a manner that would yield a different result here. Indeed, in *Greene*, the Tenth Circuit favorably cited the Fifth Circuit's decision in *Winters*. *See* 2000 WL 647190, at *2.

In short, contrary to petitioners' argument, the First, Seventh, and Eleventh Circuit have not taken an "approach" that is inconsistent with the Eighth Circuit or contrary to the Fifth Circuit's *Winters* decision. *See* 166 A.L.R. Fed. 297, § 4 (listing *Camacho*, *Winters*, and *Magnin* as applying the same "acting under" standard). Rather, the cases that have come before the First, Seventh, and Eleventh Circuits simply have not required them to consider the full range of circumstances in which the statute might apply. In the only remotely analogous case petitioners cite -- *Winters* -- the court found removal proper.

There is no reason to think that the outcome of this case would have been any different in any other circuit. Accordingly, there is no division of authority that would warrant this Court's review.

B. The Eighth Circuit's Decision Is Consistent With District Court Decisions Applying § 1442(a)(1)

Petitioners suggest that there is also confusion among the district courts regarding the appropriate legal test for determining when a private party is "acting under" a federal officer. Pet. at 9 n.1. To the contrary, the district court decisions reveal remarkable consistency in defining the legal test.[5]

The district courts are uniform in holding that mere participation in a regulated industry is insufficient. Rather, courts recognize that a defendant must demonstrate that a federal officer had "direct and detailed control" over the operation in question. *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992). "Direct control is established by showing strong government intervention and the possibility that a defendant will be sued in state court as a result of the federal control." *Pack v. AC & S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993) (citation and quotations omitted). This test has been adopted by district courts in virtually every circuit.[6] It is the same test expressly adopted and applied by the Eighth Circuit below. Pet. App. 6a-13a.

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[5] Petitioners quote a sentence from PM USA's appellate brief that courts have "articulated different legal tests to describe the level of federal direction necessary." Pet. at 10 (citing Appellee's Br. 35). Plaintiffs omit the rest of that paragraph, which explained that "[t]he substance of the standard, however, is the same." Appellee's Br. at 36.

[6] *King v. Provident Bank*, No. 2:05-CV-961, 2006 WL 902271, at *4 (M.D. Ala. Apr. 6, 2006); *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1196 (M.D. Fla. 2006); *Parks v. Guidant Corp.*, 402 F. Supp. 2d 964, 967 (N.D. Ind. 2005); *Epperson v. Northrop Grumman Sys. Corp.*, No. 4:05CV2953, 2006 WL 90070, at *3 (E.D. Va. Jan. 11, 2006); *Edwards v. Blue*

Indeed, district courts in the First, Seventh, and Eleventh Circuits have adopted and applied this test without noting any confusion or concern as to whether the law in their circuits may be different. For instance, within the Eleventh Circuit, the district court in *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189 (M.D. Fla. 2006) (cited in Pet. at 10 n.2), upheld removal based on a government contract relationship where a federal officer supervised the performance of the contract. *Id.* at 1196-97. In so holding, the court relied heavily on cases that petitioners erroneously characterize as contrary to Eleventh Circuit law. *Id.* at 1196 (citing *MTBE*, 342 F. Supp. 2d at 154); *see also* Pet. at 15 (discussing *MTBE*). Similarly, in *King v. Provident Bank*, No. 2:05-CV-961-MEF, 2006 WL 902271 (M.D. Ala. Apr. 6, 2006), the court cited both *Watson* and *Magnin* in ruling that "[a] defendant's actions taken pursuant to a comprehensive and detailed federal regulatory scheme may qualify the

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Cross/Blue Shield of Tex., No. Civ. 3:05CV0144-H, 2005 WL 1240577, at *4 (N.D. Tex. May 25, 2005); *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, 381 F. Supp. 2d 398, 404-405 (D.N.J. 2005); *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 327 F. Supp. 2d 554, 562 (D. Md. 2004); *Kennedy v. Health Options, Inc.*, 329 F. Supp. 2d 1314, 1318 (S.D. Fla. 2004); *In re Agent Orange Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 448 (E.D.N.Y. 2004); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 342 F. Supp. 2d 147, 156 (S.D.N.Y. 2004); *AIG Europe (UK) Ltd. v. McDonnell Douglas Corp.*, No. CV 02-8703-GAF, 2003 WL 257702, at *2 (C.D. Cal. Jan. 28, 2003); *Freiberg v. Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1152-53 (D. Colo. 2002); *Haller v. Kaiser Found. Health Plan of the NW*, 184 F. Supp. 2d 1040, 1044 (D. Or. 2001); *Lalonde v. Delta Field Erection*, No. Civ. A. 96-3244-B-M3, 1998 WL 34301466, at *4 (M.D. La. Aug. 6, 1998); *Ajemba v. Kaiser Found. Health Plan of the Mid-Atl. States, Inc.*, Civ. No. 98-713, 1998 U.S. Dist. LEXIS 22297 (D.D.C. July 14, 1998); *Crocker v. Bordon, Inc.*, 852 F. Supp. 1322, 1325-26 (E.D. La. 1994); *Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344, 346 (S.D. Miss. 1994).

defendant as 'acting under' the direction of a federal officer." *Id.* at *4.[7]

Under the test applied by these courts, only rarely will a private party involved in implementing federal policy and programs qualify for removal under § 1442(a)(1). The district courts have had no problem in distinguishing between cases that satisfy this standard and those that do not.[8]

Finally, petitioners note that a few district court cases reached a different outcome with respect to § 1442(a)(1) removal in lights cases. *See* Pet. at 15 n.8. Those courts, however, applied the same legal standard as the Eighth Circuit; they simply reached a different conclusion as to whether the FTC had exercised sufficient control for purposes of § 1442(a)(1). *See, e.g., Paldrmic v. Altria Corporate Servs., Inc.*, 327 F. Supp. 2d 959, 966 (E.D. Wis. 2004)

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[7] Plaintiffs also cite, as "follow[ing] the Fifth Circuit," two other courts in the Seventh and Eleventh Circuits. *See* Pet. at 14 & n.7 (citing *Park*, 402 F. Supp. 2d at 967; *Kennedy*, 329 F. Supp. 2d at 1318).

[8] *See, e.g., City of Livingston v. Dow Chem. Co.*, No. C 05-03262, 2005 WL 2463916, at *3 (N.D. Cal. Oct. 5, 2005) ("[t]he grant of an EPA registration does not constitute direction from the federal government") (citation and quotation omitted); *Kaye v. Southwest Airlines Co.*, No. Civ.A.3:05CV0450-D, 2005 WL 2074327 (N.D. Tex. Aug. 29, 2005) (rejecting removal in airline industry); *Kennedy*, 329 F. Supp. 2d 1314 (removal inappropriate despite Medicare regulations); *Jamison v. Purdue Pharma Co.*, 251 F. Supp. 2d 1315, 1326-27 (S.D. Miss. 2003) (regulated status of drug manufacturers and marketers is insufficient for removal); *Guckin v. Nagle*, 259 F. Supp. 2d 406, 415-18 (E.D. Pa. 2003) (rejecting removal in the claim related to FDA-approved medical device); *Russell v. Baxter Healthcare Corp.*, No. CIV.A.01-2296, 2002 WL 975679, at *8 (E.D. La. May 10, 2002) ("While the FDA licensed and regulated many of defendants' activities with respect to the production, manufacturing, [and] distribution . . ., the federal involvement was not so invasive" so as to warrant § 1442(a)(1) removal); *Little v. Purdue Pharma, L.P.*, 227 F. Supp. 2d 838, 860-62 (S.D. Ohio 2002) (regulated drug manufacturers not entitled to removal).

(defendant must establish "direct and detailed control"); *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 845 (N.D.W. Va. 2004) (requiring conduct "performed pursuant to an officer's direct orders or to comprehensive and detailed regulations") (citation and quotations omitted); *Pearson v. Philip Morris USA, Inc.*, Civ. No. 03-CV-178, 2003 U.S. Dist. LEXIS 24508, at *5 (D. Or. Aug. 8, 2003) (requiring "direct and detailed" control) (citation omitted). Any "conflict" raised by these district court cases does not warrant Supreme Court review. *See* Robert L. Stern, *et al.*, Supreme Court Practice 229 (8th ed. 2002); *see also Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Notably, the Seventh Circuit recently accepted interlocutory review of a decision permitting § 1442(a)(1) removal in a personal injury action based on lights allegations. *See Kelly v. Martin & Bayley, Inc.*, No. 06-8007 (7th Cir. Mar. 6, 2006); *see also* Pet. at 16 n.8 (noting pending review). Accordingly, in the near future, a second circuit court will rule on the availability of § 1442(a)(1) removal in the lights cigarette context. Petitioners have offered no good reason why this Court should grant review of this issue now when no other circuit court has addressed the issue and when another circuit will do so imminently.[9]

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[9] Petitioners refer to certain statements made by lawyers for the Department of Justice (DOJ) in the course of ongoing RICO litigation against PM USA and other tobacco companies. *See* Pet. at 23-24. In the court below, *amici* attempted to rely on these statements in supporting rehearing or reconsideration *en banc*, but the Eighth Circuit struck the statements as outside the record. *Watson v. Philip Morris USA*, No. 04-1225, Order (8th Cir. Nov. 2, 2005). Furthermore, petitioners ignore that in that litigation the FTC had someone speak directly on its behalf -- the Deputy Director of the FTC's Bureau of Consumer Protection testifying in a Rule 30(b)(6) capacity. The Eighth Circuit found that this testimony supported its decision below. Pet. App. 13a.

II. THE ISSUE PRESENTED IS NOT WORTHY OF REVIEW BECAUSE IT IS LIMITED TO THE LIGHTS CIGARETTE CONTEXT

Petitioners contend that permitting § 1442(a)(1) jurisdiction here will inevitably swamp the federal courts by permitting jurisdiction for all regulated industries. Pet. at 29-30. These "Chicken Little" fears are entirely groundless. Indeed, the courts' reaction to the Fifth Circuit's decision in *Winters* proves the point. Petitioners assert that the Eighth Circuit's approach "tracks" the Fifth Circuit's approach in *Winters*. Pet. at 13. *Winters*, however, was issued over eight years ago -- in 1998 -- yet petitioners can point to no resulting explosion in cases pending in federal court because of removals under § 1442(a)(1).[10] As noted above, no court -- including the Eighth Circuit in *Watson* -- has held that mere participation in a regulated industry is sufficient to justify removal under § 1442(a)(1). Pet. App. 6a.

This case is not worthy of review because the Eighth Circuit's decision is based on a one-of-a-kind regulatory program and thus presents issues that will not "frequently arise." *Perry v. Leeke*, 488 U.S. 272, 277 (1989). The Eighth Circuit made clear that its decision was based on the "*unique*" and "*unusual*" facts with respect to the FTC's 40-year regulatory history. Pet. App. 13a (emphases added). As the court summarized, "[t]he FTC involved itself in the tobacco industry to an *unprecedented* extent." *Id.* (emphasis added). For example, the Eighth Circuit found that the FTC:

1. specified the testing method that was to be used for measuring tar and nicotine yields, *id.* at 8a-9a;

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[10] CAFA, for example, has had a much more significant impact. Between its enactment on February 18, 2005 and April 19, 2006, a search of Westlaw reveals 86 reported decisions addressing whether removal is proper under CAFA. By contrast, during that period, there were 27 reported decisions addressing whether private parties could remove under the federal officer statute, and only 7 permitted removal.

2. "itself conducted the entire testing process for twenty years," *id.* at 9a;[11]

3. "now requires the cigarette manufacturers to conduct testing to its specifications," Pet. App. 9a;

4. "continues to inspect the industry labs, independently verify the results, and publish the ratings," *id.*;

5. "compelled the tobacco industry to advertise the tar and nicotine ratings" measured by the FTC's test, *id.* at 11a;

6. directed the "specific manner" in which the industry must advertise the FTC's tar and nicotine measurements, *id.* at 8a-9a;

7. "made it clear" that "it has not found any other testing method adequate" and that it would be "deceptive" to use any other method even if the alternative method produced *higher* yields, *id.* at 11a;

8. "was well-aware of the limitations" of its test and even "studied" how cigarette design features "affected their tar and nicotine ratings," yet "ultimately chose to continue using" its test, *id.* 15a-16a;

9. "monitor[s] cigarette ads and occasionally bring[s] claims against [the] companies," *id.* at 9a; and

10. declared and affirmed that the use of such terms as "low tar" and "lights" were not deceptive as long as they were substantiated by the FTC Method, *id.* 13a-16a.

Given the "unique" and "unprecedented" FTC history upon which the Eighth Circuit's decision was based, the decision will have little or no impact outside of the lights cigarette

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[11] Petitioners question why the Eighth Circuit found the fact that the FTC conducted the testing itself to be significant. Pet. at 28 n.16. That the FTC developed and conducted the test in its own labs for two decades is one indication of the extent to which the FTC has gone beyond mere regulation and is actively participating in and controlling the challenged conduct. Indeed, as the Deputy Director of the FTC's Bureau of Consumer Protection recognized, the FTC's creation of its own testing lab "was really something that was unique." Pet. App. 13a.

context. Indeed, Judge Gruender wrote separately to warn that *Watson* "should not be construed as an invitation to every participant in a heavily regulated industry" to invoke removal. *Id.* at 18a. Judge Gruender emphasized that "this is a *rare* case," in which the "FTC's direction and control of the testing and marketing practices at issue is *extraordinary*." *Id.* (emphases added).[12]

Contrary to petitioners' predictions, Pet. at 27-28, courts are not ignoring Judge Gruender's admonitions. No court has relied on the Eighth Circuit's decision as the basis for removal for any other industry. To the contrary, courts outside of the lights cigarette context have recognized the limited nature of the decision. Indeed, one court refused to apply it to the medical device context -- one of the very regulatory contexts in which petitioners contend cases would become removable under *Watson*. *Compare* Pet. at 30 (identifying medical devices as regulatory scheme that is supposedly no different from the FTC's program here) *with Parks*, 402 F. Supp. 2d at 969-70 (distinguishing *Watson* based on the "unprecedented" FTC history with respect to light cigarettes); *see also King*, 2006 WL 902271, at *4 (rejecting an argument that *Watson* compels removal in the home lending context).[13] In the unlikely event that *Watson* did lead to a dramatic increase in removals for other industries, this Court could grant review in one of those cases at that time. It makes no sense to grant review now, when there is no indication that *Watson* will have any impact outside of lights cigarette litigation.

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[12] Indeed, this Court has recognized that, "[o]wing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products . . ." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

[13] Courts have rejected removal in other regulated industries identified by petitioners. *See, e.g.*, *Kaye*, 2005 WL 2074327 (airline industry); *Guckin*, 259 F. Supp. 2d at 417 (FDA-approved medical device).

Finally, even *within* the tobacco context, *Watson* will have limited application, particularly with respect to the most complex and burdensome cases -- *i.e.*, class actions. The enactment of CAFA on February 18, 2005 -- *after Watson* was filed -- provides an independent basis for removal and thus obviates the need for § 1442(a)(1) removal for *Watson*-type class actions filed after February 18, 2005. Thus, even with respect to class actions like *Watson*, removal under § 1442(a)(1) is unlikely to recur beyond *Watson* and a very small number of other cases pending before CAFA took effect.[14] This is yet another reason why there is no basis for this Court's review.

III. THE EIGHTH CIRCUIT'S DECISION IS ENTIRELY CONSISTENT WITH § 1442(A)(1) AND THIS COURT'S PRECEDENTS

The decision below is entirely consistent with the statute and decisions of this Court. The Eighth Circuit expressly relied upon this Court's four-prong test for removal under § 1442(a)(1), which requires that the defendant (1) act under the direction of a federal officer; (2) show a nexus or "causal connection" between the alleged conduct and the official authority; (3) have a colorable federal defense; and (4) be a

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[14] Of the 17 lights class actions or putative class actions pending against PM USA in state court, PM USA removed only two pending class actions based on the Eighth Circuit's decision in *Watson* -- the two other lights class actions filed before CAFA that were pending against PM USA in state courts within the Eighth Circuit. In one of these two cases, *Curtis v. Altria Group, Inc.*, Case No. 0:05-cv-02231-JMR-FLN (D. Minn. Feb. 14, 2006), the court denied plaintiffs' motion to remand. In the other, the court remanded, concluding that the removal was not timely. *See Craft v. Philip Morris Cos.*, No. 4 05-CV-01531ERW (E.D. Mo. Mar. 17, 2006). Nor is the decision below likely to have broad application to individual smoking and health cases. Many smoking and health cases are within federal jurisdiction based on diversity of citizenship. Further, most do not make the lights-specific allegations at issue here and therefore would not implicate the decision below.

"person" within the meaning of the statute. *See* Pet. App. 4a (citing *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999), and *Mesa v. California*, 489 U.S. 121, 124-25 (1989)). This Court's decisions recognize that Congress provided, in broad and inclusive language, for removal not just of suits brought against federal officers, but also suits brought against "any person acting under that officer." 28 U.S.C. § 1442(a)(1).

Petitioners do not dispute the Eighth Circuit's holdings with respect to three of these four factors (causal connection, colorable federal defense, or person). Instead, they challenge only the finding that PM USA satisfied the "acting under" requirement. None of petitioners' arguments withstands scrutiny.

A. The Eighth Circuit Correctly Held That The Statute Should Not Be Given A "Narrow" Or "Limited" Interpretation

As a threshold matter, petitioners contend that the Eighth Circuit erred in refusing to interpret the statute in a narrow, limited fashion. Pet. at 20-21. Yet, as the Eighth Circuit correctly recognized, this Court expressly rejected such a "narrow, grudging interpretation" of § 1442(a)(1) in *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). The statute has even been recognized as an exception to the "well-pleaded complaint" rule. *Mesa*, 489 U.S. at 136.

Petitioners contend that *Willingham*'s directive is limited to instances involving federal officers, not a private party acting under federal direction. Pet. at 20-21. This Court, however, did not distinguish between the type of party asserting removal, but rather held that a broad interpretation of the statute is necessary to further the "policy" underlying § 1442(a)(1). 395 U.S. at 407. The policy applies with the same force regardless of whether the defendant is a federal officer or a private party acting under the direction of a federal officer. *See, e.g., id.* at 405-06; *Tennessee v. Davis*, 100 U.S. 257, 263-66 (1879).

In support of a narrow construction, petitioners cite to *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), in which this Court held that a federal agency does not constitute a federal officer. *Id.* at 81-82 (cited in Pet. at 21). But petitioners ignore that Congress subsequently amended the statute to reverse *International Primate* and clarify that agencies are federal officers. *See* Pub. L. 104-317, § 206(a)(1), 110 Stat. 3847, 3850 (1996). In amending the statute, Congress made clear that "[a] federal forum in such cases is important since state court actions against federal agencies and officers often involve complex federal issues and federal-state conflicts." H.R. REP. No. 104-798, at 19 (1996); *see also* S. REP. No. 104-366, at 31 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4210. As the Eighth Circuit recognized, Congress' decision to amend the statute to overrule *International Primate* "provides further support for a broad interpretation." Pet. App. 6a.

B. The Statute Is Not Limited To Instances In Which The Private Party Is "Enforcing" Federal Law

1. The Plain Language Of § 1442(a)(1) Is Not Limited To Enforcement Of Federal Law

Petitioners argue for an extraordinarily narrow interpretation of § 1442(a)(1), asserting that the statute should apply only where the private party is serving in an official capacity by *enforcing* federal law. Pet. at 19-20. This Court has never interpreted the statute in such a limited fashion. Nor has any circuit or district court. In fact, lower courts have repeatedly recognized that, where the level of federal control is sufficiently strong and detailed, a private party may

be "acting under" federal direction in circumstances involving the *implementation* of federal policies and directives.[15]

Petitioners' argument is also squarely contradicted by the plain language of the statute. Section 1442(a)(1) provides that "any person acting under that officer" may remove under the statute. The generic language of the statute does not distinguish among the ways in which a party may "act under" federal direction, and nowhere does the statute provide that the party must be enforcing federal law. In essence, petitioners ask this Court to add a requirement that Congress did not include in the statute. *See, e.g., Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (the Court does "not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply"); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there") (citation omitted).

Petitioners note that the statute provides that the removing party must have been sued "for any act under color of such office." Pet. at 19. But a federal officer can act "under color of office" in a variety of ways other than enforcing federal law. The "color of office" requirement is intended to ensure that the federal officer was not participating "in some kind of 'frolic of [his or her] own.'" *Willingham*, 395 U.S. at 409; *see also* 54 A.L.R. Fed. 442 § 2(b) ("color of office" requirement ensures that the conduct was "justified" by the federal officer's "federal duties"). Here, the FTC was clearly not participating in a "frolic of its own" in providing its direction to PM USA -- as discussed above, there can be no

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[15] *See, e.g., Winters*, 149 F.3d at 399; *H&H Ship*, 1995 WL 619293; *In re Agent Orange*, 304 F. Supp. 2d at 446-48; *MTBE*, 342 F. Supp. 2d at 156-57; *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 710-11 (E.D. Tex. 1998); *Pack*, 838 F. Supp. at 1102-03.

question that the FTC has broad authority under both the FTC Act and the Labeling Act to address the advertising and marketing of cigarettes. *See supra* n.2.[16]

2. The Policy Underlying § 1442(a)(1) Supports The Eighth Circuit's Interpretation

Petitioners' narrow construction of § 1442(a)(1) is also not supported by the purpose of the statute. Petitioners cannot point to any evidence that Congress was concerned *only* about "state animus against the enforcement of federal law," as they contend. Pet. at 22. Rather, as Congress explained in its most recent amendments to the statute, its "intent" is much broader: to ensure "that questions concerning the exercise of Federal Authority, the scope of Federal immunity and Federal-State conflicts be adjudicated in Federal court." S. REP. No. 104-366, at 31; *see also* H.R. REP. No. 104-798, at 19 (same).

Accordingly, contrary to petitioners' suggestions, § 1442(a)(1) is not limited to instances involving the assertion of the "official immunity" defense. Pet. at 23. Instead, as this Court has held, the statute applies where the removing party asserts any colorable federal defense. *See Willingham*, 395 U.S. at 406. Indeed, Congress has specifically made clear that it intends for § 1442(a)(1) to ensure a "federal forum" for "important and complex Federal issues *such as preemption*," the federal defense at issue here. 142 Cong. Rec. S6517, S6519 (June 19, 1996) (emphasis added); *see also* S. REP. No. 104-366, at 31 (same).

In short, as the Eighth Circuit correctly recognized, this case presents a clear state law challenge to the FTC's exercise

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[16] Petitioners note that "this Court has expressly recognized statutory limitations on the FTC's regulatory authority over cigarettes." Pet. at 28. The only such limitation with respect to cigarette advertising is that Congress has reserved to itself the decision of what health warnings to require on cigarette packaging -- an issue that has no significance here. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 149-50.

of its authority over tar and nicotine measurements, disclosures, and marketing, and thus falls well within the ambit of § 1442(a)(1).

3. Petitioners' Reliance On An Analogy To 28 U.S.C. § 1443(2) Is Misplaced

Nor does *City of Greenwood, Mississippi v. Peacock*, 384 U.S. 808 (1966) (cited in Pet. at 19), support petitioners' strained interpretation of the statute. In *City of Greenwood*, this Court was interpreting a different statute -- the civil rights removal provision of 28 U.S.C. § 1443(2). There, defendants asserted that removal was proper because, by engaging in "civil rights activity," they were acting under the general authority of the Constitution and civil rights statutes. 384 U.S. at 810-11. The question before this Court was whether the removing party must show *any* relationship with a federal officer to remove under § 1443(2).

Beyond that, § 1443(2) has different statutory language and history and does not include the "acting under" language at issue here. Section 1443(2) is also much more limited in its purpose -- it is specifically intended to ensure a federal forum for parties that are sued for enforcing civil rights statutes. *See* 28 U.S.C. § 1443(2). By contrast, § 1442(a)(1) is intended to apply more broadly when a party is "acting under" federal direction. *See White v. Wellington*, 627 F.2d 582, 585 n.4 (2d Cir. 1980) (§ 1442(a)(1) is "greater in scope" than § 1443(2)). Contrary to petitioners' arguments, this Court never held that § 1443(2) "track[s]" the "acting under" requirement of § 1442(a)(1). Pet. at 20. Rather, this Court merely noted that there is an "overlap between the provisions," such that "many, if not all" of the cases removable under § 1443(2) would also be independently removable under § 1442(a)(1). *City of Greenwood*, 384 U.S. at 820 n.17.

C. The Eighth Circuit Did Not Conflate Removal With Conflict Preemption

Finally, petitioners mischaracterize the Eighth Circuit's decision as conflating removal with preemption. *See* Pet. at 24-25. The court did no such thing. Instead, the court properly defined the "acting under" test as "depend[ing] on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." Pet. App. 6a. That test is different from the conflict preemption standard, which examines whether state law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000).

The language focused on by petitioners, in which the Eighth Circuit noted that the lawsuit "directly implicates the enforcement and wisdom of the FTC's tobacco policies," 15a, was part of the court's determination as to whether the "causal connection" requirement was satisfied. Petitioners do not challenge that finding here. In determining whether PM USA satisfied the "causal connection" prong, the court was merely determining whether the "acts challenged in the plaintiff's complaint" were the acts taken at the direction of a federal officer. Pet. App. 13a. That the lawsuit inevitably challenges the FTC's policies is one means of establishing that such a causal connection exists.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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The Eighth Circuit's decision in this case is the most far-reaching expansion of the federal officer removal statute ever decided by a federal court. The court below held that Philip Morris, sued here under state law in state court for purely commercial acts arising from its marketing of light cigarettes, could remove to federal court because it was "acting under" a federal officer. 28 U.S.C. § 1442(a)(1). The absurdity of that holding is demonstrated, in part, by the fact that the federal government is currently suing Philip Morris for the very same acts that the company claims entitle it to removal as though it is an officer of the federal government. The Eighth Circuit's decision directly conflicts with this Court's construction of previous iterations of the federal officer removal statute in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), a case not cited by the Eighth Circuit. *Peacock* holds that, to the extent § 1442(a)(1) protects private actors, such actors (unlike Philip Morris here) must be assisting federal officers in enforcing federal law. This Court's review is urgently needed to correct the Eighth Circuit's errant approach, to bring clarity to an issue that divides and confuses federal courts, and to preserve a proper jurisdictional balance between the federal and state judicial systems.

THE EIGHTH CIRCUIT'S ERRONEOUS DECISION FURTHER DIVIDES THE FEDERAL COURTS

A. Federal Courts Are Divided Over § 1442(a)(1)

Circuits have adopted markedly different approaches to applying the federal officer removal statute in cases involving private actors. Philip Morris's contrary claim (Opp. 11) improperly focuses on the fact that those cases upheld removal, while ignoring that the legal tests announced in those cases would not support Philip Morris's bid to invoke § 1442(a)(1). The outcome here unquestionably would have been different in three other circuits.

Philip Morris does not challenge that the First, Seventh, and Eleventh Circuits have articulated a test with dispositive factors – such as the official character of acts by private parties – that are *irrelevant* under approaches

taken by the Fifth and Eighth Circuits. And the Ninth and Tenth Circuits have framed tests that exacerbate the confusion among the circuits, because those circuits allow private actors to remove absent any claim that the defendants were engaged in official conduct *or* that the government exercised comprehensive or detailed control.

In *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989), for instance, the First Circuit held that, "[i]n . . . circumstances" when a private party acts "strictly and solely at federal behest" in carrying out "official government business," "the reach of section 1442(a)(1) extends to private persons . . . who act under the direction of federal officers." *Id.* at 486. Although the court upheld the removal of a telephone company assisting federal officers in carrying out official surveillance, the test it applied plainly diverges from the Eighth Circuit's test, which deemed *irrelevant* whether Philip Morris was carrying out official governmental business.

Likewise, in *Venezia v. Robinson*, 16 F.3d 209 (7th Cir. 1994), the Seventh Circuit held that the defendant – a state officer – was entitled to removal based on the claim that he acted "at all pertinent times . . . under the direction of agents of the Federal Bureau of Investigation as part of a criminal investigation, and that during the two-hour meeting with Venezia he had been wearing a tape recorder at the federal agents' request." *Id.* at 211; *see also id.* (defendant was "participating in a federal investigation and acted under the instructions of federal agents"). Crucially, the Seventh Circuit emphasized the defendant's actions were "in the course of a criminal investigation," *id.* at 212, thereby underscoring the official character of those acts. Contrary to the Fifth and Eighth Circuits, the Seventh Circuit does not analyze the comprehensiveness or detail of federal control as dispositive factors for removal.

So too in *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996). There, the defendant alleged that he "was acting on behalf of the [Federal Aviation Ad-

ministration ("FAA")], under the authority granted to him by the FAA, and within the limits prescribed by the FAA." *Id.* at 1427. Importantly, in deciding that removal was proper, the court did not make the comprehensiveness or detail of FAA oversight dispositive, but rather found it crucial that the defendant was "an authorized agent of the FAA" to whom the FAA had "delegate[d]" some of the "powers and duties" of the government. *Id.* at 1428.[1]

By focusing upon the official character of the defendant's conduct, those cases construe § 1442(a)(1) in a manner that starkly conflicts with the Eighth Circuit's analysis of "federal control." Although Philip Morris insists that removal was not denied in any of those cases and that the "official function" approach is not exclusive of the Eighth Circuit's "federal control" test (Opp. 11-12), it ignores that several district courts have denied removal on the ground that the defendant was not engaging in official governmental conduct. Those decisions underscore the inconsistent outcomes at the district court level – where removal and remand are fought out largely without appellate review (*see* Pet. 9 n.1) – from applying the different circuits' various tests for "acting under."

In *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530 (W.D. Ky. 1996), for example, the court held that the "[c]ase law demonstrates that the purpose of [§ 1442(a)(1)] is to protect officials who are enforcing federal laws." *Id.* at 533. The court found that standard was not met when a party is subpoenaed to testify before a grand jury because "he has not been directed to perform official functions as an officer or agent of the government." *Id.* That case thus illustrates how an official function framework – like that taken by the First, Seventh, and Eleventh Circuits – is fundamentally divergent from a

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[1] *Lovell Manufacturing v. Export-Import Bank of the United States*, 843 F.2d 725, 734 n.13 (3d Cir. 1988), questions whether "a mere agency-principal relationship between [a federal agency] and [a private corporation] would be sufficient to support jurisdiction" under § 1442(a)(1).

comprehensive and detailed control test, under which a subpoenaed party might very well have a claim to removal. Other district courts also make that point clear.[2]

Given that Philip Morris makes no effort to account for those decisions, which have read § 1442(a)(1) in light of its historical purpose of protecting those enforcing federal law, its assertions that there is no such thing as an official function test (Opp. 13) and that federal courts have treated private actors invoking § 1442(a)(1) uniformly (Opp. 14) have no merit.

The Ninth and Tenth Circuits have added to the confusion among the courts by making broad, unrefined judgments about whether the defendant was acting under federal control. *See California v. H&H Ship Serv. Co.*, No. 94-10182, 1995 WL 619293 (9th Cir. Oct. 17, 1995) (judgment noted at 68 F.3d 481); *Greene v. Citigroup Inc.*, No. 99-1030, 2000 WL 647190 (10th Cir. May 19, 2000) (judgment noted at 215 F.3d 1336). In those circuits, contrary to both the official function test and the comprehensive and detailed control test, nearly *all* private regulated parties would presumptively be entitled to removal.

Federal district court decisions reflect the divergent legal tests and resulting confusion on two fronts: first, whether a private actor must have been engaged in official conduct to avail itself of § 1442(a)(1); and, second,

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[2] *See Freiberg v. Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1150 (D. Colo. 2002) ("private actors seeking to benefit from [§ 1442(a)(1)] bear a special burden of establishing the official nature of their activities"); *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (removal is permitted "only when the corporation is so intimately involved with government functions as to occupy essentially the position of an employee of the government"); *Kaplansky v. Associated YM-YWHA's of Greater New York, Inc.*, No. 88 CV 1292, 1989 WL 29938, at *3 (E.D.N.Y. Mar. 27, 1989) (parties complying with subpoena were not "acting under" federal officer because defendants were not "asked to stand in the shoes of [federal] officers or agents and perform 'official' functions"); *see also Northern Colorado Water Conservancy Dist. v. Board of County Comm'rs*, 482 F. Supp. 1115, 1118 (D. Colo. 1980).

what degree of federal control warrants removal.[3] Philip Morris entirely overlooks the first type of conflict, as set forth above, and it takes wholly inconsistent positions on the second. *Compare* Opp. 16 (asserting that "district courts have had no problem in distinguishing between cases that satisfy [a detailed control test] and those that do not") *with id.* (noting that multiple district courts, on the same facts as *Watson*, "reached a different conclusion as to whether the [Federal Trade Commission] had exercised sufficient control for purposes of § 1442(a)(1)").[4]

B. *Watson* Conflicts With This Court's Precedent

The Eighth Circuit's decision is strikingly incorrect, as it conflicts with the text and purposes of § 1442(a)(1), as interpreted by this Court. The federal officer removal statute does not extend a privilege of removal to a private regulated actor complying with federal law. It surely does not do so where the "regulation" of the industry is as meager as it is here. *See* Public Citizen *Amicus* Br. 5-12.

1. This Court's decision in *Peacock* shows why § 1442(a)(1) protects private actors only insofar as they are affirmatively assisting federal officers in enforcing federal law. *See* Pet. 19-20. Philip Morris's efforts (at 26) to distinguish the decision betray a basic misunderstanding of the case. In *Peacock*, this Court construed § 1443(2) in light of the progenitor of that statute in the Civil

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[3] *See McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1196 (M.D. Fla. 2006) ("there are varying formulations of the test for removal under the federal officer provision"); *Lalonde v. Delta Field Erection*, No. Civ. A. 96-3244-B-M3, 1998 WL 34301466, at *2 (M.D. La. Aug. 6, 1998) ("Neither the Supreme Court nor the Fifth Circuit have established what is required to show that a government contractor is 'acting under' an officer of the United States or of an agency thereof. Cases from other federal district courts . . . vary in their approach to what is required under this element.").

[4] That district courts do not always follow the decisions of the appropriate courts of appeals (*see* Opp. 15, 16 n.7) only underscores the confusion surrounding § 1442(a)(1) and the need for this Court's review. The outcome of a removal decision thus turns not only upon the circuit, but also the district court, that hears the case. *See* Pet. 17.

Rights Act of 1866, which spoke of "any officer, civil or military, or *other person*." 384 U.S. at 815 (internal quotation marks omitted). The Court held that the "other person" clause tracked the Customs Act of 1815, which, as we have pointed out, was a precursor to § 1442(a)(1). *See* Pet. 4. The Court then read the Customs Act as allowing removal by private parties – *i.e.*, other persons – but only for acts "aiding or assisting" customs officers in performing "official actions." 384 U.S. at 820 n.17. Furthermore, the Court found that the "acting under" clause of the federal revenue officer statute – adopted in 1866 – "obviously drew on the comparable characterization of the 'other person' in the Customs Act of 1815." *Id.* at 823 n.20.

Peacock thus makes clear that the "other person" language of the precursor to § 1443(2) and "other person" and "acting under" provisions of statutory antecedents to § 1442(a)(1) should be construed *in pari materia*.[5] That is crucial here because the Court also concluded that § 1443(2) "confers a privilege of removal only upon federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights." *Id.* at 824. And, the Court explained, that "limitation . . . to official enforcement activity . . . draws support from analogous provisions in the removal statutes available to federal revenue officers." *Id.* at 820 n.17.[6] The Eighth Circuit's

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[5] Philip Morris's point (at 26) that § 1442(a)(1) is broader than § 1443(2) is true, but irrelevant. The reason § 1442(a)(1) is broader than § 1443(2) is that by affording protection to all federal officers – irrespective of whether they are enforcing civil rights statutes – § 1442(a)(1) may functionally encompass all of § 1443(2). The key point here is that this Court held that § 1443(2) contains an implied "acting under" limitation analogous to the federal officer removal statute. *See In re County Collector of County of Winnebago*, 96 F.3d 890, 897 (7th Cir. 1996) (noting *Peacock* held § 1443(2) was "limited to enforcement activity by federal officers and those *acting under* them") (internal quotation marks omitted, emphasis added).

[6] *See also Davis v. South Carolina*, 107 U.S. 597, 600 (1883) ("non-commissioned officer in the army, detailed as a guard in aid of" a marshal tasked with enforcing revenue laws, was entitled to removal

interpretation of § 1442(a)(1), which elides the difference between a party *enforcing* federal law and a party *complying* with federal law, is thus inconsistent with this Court's precedent.

2. Philip Morris's reliance (at 25) on the legislative history of the 1996 amendment to § 1442(a), which brought federal agencies within the ambit of the statute, does not help its cause.[7] Congress's desire that federal agencies – no less than federal officers – should be able to invoke § 1442(a)(1) offers no support for the view that Philip Morris, a private regulated actor, may do so as well. Indeed, the quoted legislative history is entirely consistent with the view that federal agencies – whose *raison d'être* is enforcing federal law – should, like federal officers, be able to remove. *See, e.g.*, S. Rep. No. 104-366, at 30-31 (1996) ("A Federal forum in such cases is important since state court actions *against Federal agencies* and officers often involve complex Federal issues and Federal-State conflicts.") (emphasis added). The cited legislative history does not support a right to removal for private regulated parties.[8]

Philip Morris thus can offer no satisfactory defense of the Eighth Circuit's decision on the merits. As a private

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because statute "shield[ed] all who lawfully assist [a federal officer] in the performance of his official duty").

[7] Philip Morris never disputes that both *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), and *Mesa v. California*, 489 U.S. 121 (1989), show that the Eighth Circuit erred in reading this Court's precedent as requiring a mechanical presumption of a broad interpretation of § 1442(a)(1) anytime the statute is invoked. *See* Pet. 20-21.

[8] Philip Morris's effort (at 27) to deflect the Eighth Circuit's conflation of preemption and removal is off the mark. This Court has consistently held that preemption defenses do not entitle private actors to removal, *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987), and that state courts are entirely competent to resolve such defenses, *see Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988). *See* Pet. 24-25. Nothing in the legislative history of the 1996 amendments evinces an intent to disrupt those venerable jurisdictional principles.

regulated actor, Philip Morris is not enforcing federal law, *see Willingham v. Morgan*, 395 U.S. 402, 406 (1969); not at risk from state animus against federal officials, *see Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981); and not in need of a federal forum to hear any official immunity defense, *see International Primate Protection League*, 500 U.S. at 86-87. None of the historical rationales for the statute therefore is at issue. *See* Pet. 21-23.

In all events, the United States has a significant stake in the proper construction of § 1442(a)(1). In all of the recent cases before this Court involving the federal officer removal statute, the United States has participated as a party representing a federal officer or as an *amicus curiae* stating its views to the Court.[9] Accordingly, if any doubt exists about the Eighth Circuit's erroneous position that Philip Morris was acting under a federal officer, then this Court should seek the views of the Solicitor General.

C. This Case Is An Excellent Vehicle For Resolving The Issues Raised In The Petition

This case affords an ideal opportunity for this Court to give a proper interpretation of the scope of § 1442(a)(1). The issue is purely one of law. *See* Pet. 25-26. Philip Morris's only contrary claim (at 17) is that the Seventh Circuit's decision to review a similar issue weighs against the need for review here. That is not so. If the Seventh Circuit reads *Venezia* as circuit precedent for an official function approach – and denies removal upon that basis – then the divide in the circuits will be no sharper than it is

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[9] *See Jefferson County v. Acker*, 527 U.S. 423, 432 (1999) (United States as *amicus curiae* supporting federal district court judges seeking removal); *International Primate Protection League*, 500 U.S. at 75 (Solicitor General represented the removing federal agency); *Mesa*, 489 U.S. at 124 (Solicitor General represented federal Postal Service employees); *Willingham*, 395 U.S. at 404 (Solicitor General represented removing defendants, warden and chief medical officer of federal prison); *Colorado v. Symes*, 286 U.S. 510, 515 (1932) (Solicitor General submitted a brief in opposition to remand of prosecution against federal prohibition officer).

today, and Philip Morris will likely not petition for certiorari (fearful of losing the benefits afforded by the Eighth Circuit's decision). This Court's opportunity to correct the Eighth Circuit's extraordinary holding, and to bring clarity to this issue, will thus be lost. But, if the Seventh Circuit, like the Eighth Circuit, upholds removal, the state of the law will only be more confused. Correcting the Eighth Circuit's erroneous holding now is therefore appropriate.

Issues of § 1442(a)(1) removal do not often arise in the courts of appeals because of the prohibition on appellate review of remand orders in 28 U.S.C. § 1447(d) (*see* Pet. 9 n.1). This case thus presents an especially attractive vehicle, with an undisputed record, to resolve this important jurisdictional question. Countless federal courts will continue to misapply the statute – allowing private regulated parties to remove state-law actions to federal court – in the interim.

D. *Watson* Raises Exceptionally Important Issues

Section 1442(a)(1) implicates exceptionally important jurisdictional interests. *See* Pet. 26-27.[10] Philip Morris does not disagree; instead, it erroneously believes that this case does not warrant certiorari because the Eighth Circuit's decision will be limited to the tobacco context and because the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, affords an independent right to remove certain types of class actions like *Watson*.

First, the Eighth Circuit's reasoning cannot reasonably be limited to tobacco. *See* Pet. 27-30. The concurring judge's attempt to limit the case to light cigarettes –

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[10] Philip Morris wrongly suggests (at 18) that this Court need not worry about a wave of removals because *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998) – upon which the Eighth Circuit based its decision – did not produce such effects. Although it adopted a comprehensive control test, *Winters* did so in the government contractor context. The court below has now *extended Winters* in a way that invites private regulated actors to claim a right to removal that they did not have before. *See* Pet. 29-30 & n.17.

which did not garner the approval of the majority – cannot cloak the breadth of the Eighth Circuit's holding and test. *See* Public Citizen *Amicus* Br. 5-12.

Philip Morris's reliance (at 21) on CAFA to avert this Court's review is no more persuasive. The universe of cases in which § 1442(a)(1) may be invoked – under the Eighth Circuit's test – is far more expansive than the scope of cases affected by CAFA. Indeed, because the Eighth Circuit's test focuses on the actions of the *defendant*, not the plaintiffs, it is irrelevant in resolving this issue that the case is brought as a class action. Under the Eighth Circuit's logic, the federal officer removal statute may be invoked in any state-law action brought against a regulated company, *see, e.g.*, *Kelly v. Martin & Bayley, Inc.*, No. 05-CV-0409-DRH, 2006 WL 44183, at *3-*4 (S.D. Ill. Jan. 9, 2006), to which CAFA will have no application – a result far afield from Congress's purpose of ensuring that federal interests will be litigated in federal courts. Moreover, CAFA is subject to several important limitations, including exceptions for class actions involving defendants and class members who are mostly citizens of the forum State, actions with fewer than 100 class members, and shareholder actions or derivative suits based on state law. *See* CAFA § 4, 119 Stat. 9-10.[11] Accordingly, even with CAFA's enactment, the Eighth Circuit's decision will continue to afford private regulated companies of all types the ability to undermine the interest of States in having their judicial systems available to vindicate the interests of their citizens.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[11] *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2640 n.12 (2005) (Ginsburg, J., dissenting) (noting that CAFA is "[s]ubject to several exceptions and qualifications"); *Robinson v. Cheetah Transp.*, No. Civ. A. 06-0005, 2006 WL 468820, at *3 (W.D. La. Feb. 27, 2006) (discussing "the 'Home State' exception and the 'Local Controversy' exception" to CAFA).

Respectfully submitted,

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IN THE

Supreme Court of the United States

LISA WATSON, ET AL.,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PUBLIC CITIZEN, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a private actor doing no more than complying with federal regulation is a "person acting under a federal officer" for the purpose of 28 U.S.C. § 1442(a)(1), entitling the actor to remove to federal court a civil action brought in state court under state law.

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INTEREST OF *AMICUS CURIAE*

Public Citizen, Inc., submits this brief as *amicus curiae* in support of the petition for certiorari in this case because the Eighth Circuit's decision directly implicates its interests in preserving consumer remedies under state law and defending the role of the state courts in providing such remedies.[1]

Public Citizen, Inc., is a consumer advocacy organization founded in 1971. On behalf of its approximately 100,000 members nationwide, Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues and works toward the enactment and effective enforcement of laws protecting consumers, workers, and members of the public generally. Public Citizen is particularly concerned with improving public health laws and regulations and with ensuring public access to the court system for the redress of injuries and illnesses caused by unsafe and defective products. As a result of these concerns, Public Citizen has an interest in both the substantive and procedural aspects of litigation involving cigarettes and other tobacco products, which have caused grievous illness and injury to so many people. More generally, Public Citizen seeks to counter the misuse of procedural devices such as removal as well as the substantive defense of implied preemption, both of which increasingly are invoked by defendants in a range of litigation involving public health and safety to burden plaintiffs and escape liability under state law.

For these reasons, Public Citizen sought and was granted leave to file an *amicus* brief in this case in support of the petition for rehearing in the Eighth Circuit. Public Citizen has also appeared as amicus curiae in many cases involving to-

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[1] Letters of consent to the filing of this brief from all parties have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to preparation or submission of this brief.

bacco, including *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), *FDA v. Brown & Williamson*, 529 U.S. 120 (2000), and *Price v. Philip Morris Inc.*, __ N.E.2d __, 2005 WL 3434368 (Ill. Dec. 15, 2005). In addition, Public Citizen and its attorneys have participated in numerous appellate cases in which defendants raised preemption defenses, including *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), and *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005).

The panel's opinion implicates Public Citizen's concerns in a number of respects. Public Citizen believes that the Eighth Circuit's decision places an unwarranted procedural obstacle in the way of plaintiffs asserting state-law tort claims in state courts by cloaking cigarette companies in the guise of federal government actors and providing them the same right to remove a case to federal court as a federal officer sued for actions under color of his office. Moreover, by treating a company that is merely subject to some federal *regulation* as if it were a federal officer or agency itself, the Eighth Circuit's opinion is likely to give rise to many more removal attempts as other companies—many subject to much greater federal regulation than the tobacco industry—seek to take advantage of the court's expansion of the federal officer removal statute by asserting that they, too, were acting at the direction of federal officers and are being sued for actions under color of federal office.

Public Citizen believes that a brief reflecting its perspective may assist the Court in determining whether review of the Eighth Circuit's novel opinion is warranted. In particular, Public Citizen believes it may be useful to the Court to receive detailed information about how the supposedly "unusual" and "unique" regulation of cigarettes by the Federal Trade Commission compares to the much more extensive and detailed regulation of other products by other federal agencies. That information demonstrates that, far from justifying a special status for cigarette companies as federal agents enti-

tled to remove actions against them to federal court, the nature of the FTC's interactions with cigarette companies provides no basis for singling them out for special protections unavailable to other industries that are, in fact, more heavily regulated.

INTRODUCTION

In May 1878, federal internal revenue agent James Davis raided a moonshine still in the hills near Tracy City, Tennessee. Before he and his companion could destroy the still, seven armed men attacked them. Returning fire, Davis killed one of his assailants, wounded another, and captured a third, but he was forced to retreat without destroying the still. According to a contemporary newspaper account, the raid caused "intense excitement" in the neighborhood.[2]

A local grand jury indicted Davis for murder. With the support of the Attorney General of the United States, Davis invoked the predecessor to 28 U.S.C. § 1442(a)(1) and removed the case to federal court on the ground that he had acted in the discharge of his duties as a federal officer and was immune from state prosecution. In *Tennessee v. Davis*, 100 U.S. 257 (1880), this Court affirmed the removal, holding that because the federal government "can act only through its officers and agents," the ability to remove state court actions brought against federal officers and agents for actions within the scope of their duties was essential to the vindication of federal authority. *Id.* at 263. The Court has repeatedly pointed to *Davis* as exemplifying the core purposes of § 1442(a)(1)'s authorization for removal of cases by federal officers and persons acting under their direction who are sued in state court for the performance of official acts. *See, e.g., Mesa v. California*, 489 U.S. 121, 126-27 (1989); *Arizona v. Manypenny*, 451 U.S. 232, 241 n.16 (1981); *Willingham v. Morgan*, 395 U.S. 402, 406 (1969).

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[2] www.tngenweb.org/monroe/news3.txt.

This case is a far cry from *Davis*. Here, the Philip Morris Company, a purely private enterprise, has been sued for fraudulently misrepresenting the hazardous nature of its products—so-called "light" cigarettes. There is no claim that, in promoting and selling its cigarettes, Philip Morris was carrying out any official function of the United States. Rather, the company's claim to removal, which was accepted by the Eighth Circuit, rests solely on the supposed "regulation" of certain aspects of the cigarette industry's activities by the Federal Trade Commission, as a result of which Philip Morris claims to have been "acting under" a federal officer.[3]

The Eighth Circuit's decision departs from all previous federal appellate case law on federal officer removal by permitting removal based solely on the extent of federal regulation of private business activity that is not otherwise performed for the benefit of the federal government. The justification offered by the Eighth Circuit and parroted by Philip Morris—that the FTC's regulation of cigarette companies is so "unusual" or, indeed, "unique" as to justify treating cigarette makers as if they were federal agents—is patently wrong. Many industries are subject to much more detailed and extensive regulation than the cigarette industry. Thus, if the Eighth Circuit's reasoning were extended beyond cigarette companies, its decision could result in a tremendous expansion of federal removal jurisdiction.

It may well be that, as Philip Morris predicts, *see* Br. in Opp. 18-20, other courts will shrink from applying the Eighth

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[3] Philip Morris seems to have discovered that it was "acting under" a federal officer surprisingly late in the game, given its assertion that there is a long and unique history of federal regulation of its activities: The first reported decision in a case where a cigarette company claimed federal officer removal did not come until 2002, *see Tremblay v. Philip Morris, Inc.*, 231 F. Supp. 2d 411 (D.N.H. 2002), and even in the Eighth Circuit some of Philip Morris's attempted removals on this ground have recently been held untimely. *Craft v. Philip Morris Companies, Inc.*, 2006 WL 744415 (E.D. Mo. Mar. 17, 2006).

Circuit's reasoning outside of the cigarette industry, so that the decision below will benefit only Philip Morris and other cigarette companies. But that will result in an equally significant distortion of federal law: A special dispensation will be granted to the very industry whose claim to such an indulgence is weakest. Either way, the decision below "has so far departed from the accepted and usual court of judicial proceedings ... as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a).

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Holding That Federal Regulation Is Enough for Removal Under Section 1442(a)(1) Cannot Be Squared with the Statutory Language, this Court's Decisions, or Decisions of Other Circuits.

The federal officer removal statute, 28 U.S.C. § 1442(a)(1), provides for removal when "any officer (or any person acting under that officer) of the United States or any agency thereof" is sued in a state court "for any act under color of such office." On its face, the statute requires not only that the *actor* who is sued be an officer or person acting under him, but also that the *action* for which he is sued be an official one—that is, an act under color of office. The under-color-of-office requirement is a critical limitation of the statute, integral to its core purpose of providing for removal "broad enough to cover all cases where *federal officers* can raise a colorable defense *arising out of their duty to enforce federal law*." *Willingham*, 395 U.S. at 406-07 (emphasis added); *see also Arizona v. Manypenny*, 451 U.S. at 241 ("[R]emoval under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a *federal official* is entitled to raise a defense *arising out of his official duties.*") (emphasis added).

Whatever selling cigarettes may be, it is not action *under color of federal office*. *See Brown v. Philip Morris Inc.*, 250

F.3d 789, 801 (3d Cir. 2001) (accepting Philip Morris' argument that federal regulation of its marketing practices did not make its actions "under color of federal law" for purposes of a *Bivens* action). The Eighth Circuit departed from the words of the statute, the precedents of this Court, and the decisions of other circuits by extending removal to a lawsuit based on the defendant's purely self-interested private conduct just because it was subject to some federal regulation. This Court has made clear that even "extensive" regulation of the activities of a business does not make its actions under color of law; rather, a private person acts under color of law only when its action "may be fairly treated as that of the [government] itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *accord Blum v. Yaretsky*, 457 U.S. 991 (1982). For the same reason, removal of suits based on actions taken by federal officers or their subordinates under color of office is properly limited to cases where the removing defendant was "effectively an agent or employee of the government" performing "official functions" on its behalf. *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 846, 845 (N.D. W. Va. 2004).

In its attempt to defend the decision below, Philip Morris cites *not a single case* where another federal court of appeals has permitted removal by a defendant who was not performing some function on behalf of the federal government. Each appellate case cited by Philip Morris involved a defendant who acted as a de facto or de jure agent of the federal government or otherwise performed some federal function for or on behalf of the government, whether it be implementing a federal wiretap, participating in a federal undercover law enforcement operation, inspecting airplanes on behalf of the federal government, supplying war material to the military, or carrying out a federal environmental cleanup operation. *See* Br. in Opp. 11-13 (citing cases). As petitioner explains (Pet. 9-17), the cases from other circuits employ divergent standards for determining when removal is appropriate, but

the key point is that Philip Morris's conduct in marketing "light" cigarettes would not qualify for removal under *any* of the case authority from other circuits.

II. The FTC's "Regulation" of Cigarettes Was Not Uniquely or Even Unusually Extensive.

Recognizing that "mere participation in a regulated industry is insufficient" to support removal, Br. in Opp. 14, Philip Morris attempts to defend the Eighth Circuit's decision on the ground that the regulation to which it was subject was "unusual" and so "unique" as to differentiate Philip Morris from other regulated businesses and justify a special rule of removal for cigarette cases. Br. in Opp. 10. But the Eighth Circuit's characterization of the regulation of cigarette companies as "unprecedented," on which Philip Morris relies, Br. in Opp. 18, is itself so baseless as to call for correction by this Court. Left standing, the decision below will lead either to a potentially vast expansion of federal officer removal, as other more heavily regulated businesses seek the same benefit afforded Philip Morris by the Eighth Circuit, or to a completely unprincipled special rule benefiting only the cigarette industry.

A. The FTC's Weak "Regulation" of the Cigarette Industry Did Not Compel Philip Morris to Take the Actions for Which It Has Been Sued.

Philip Morris, echoing the Eighth Circuit's opinion, is long on adjectives characterizing the supposedly extensive regulation to which it was subjected by the FTC. *See* Br. in Opp. 3-6. The undisputed, public-record facts, however, fall far short of justifying those characterizations. Indeed, they fail to do so *as a matter of law*. The critical points, which are not subject to dispute, are:

- The FTC has *never* promulgated regulations requiring cigarette makers to test the tar and nicotine levels of cigarettes, let alone regulations defining how such tests

must be conducted, how the results must be disclosed, or how test results may be used in cigarette advertising.

- The major cigarette makers' adherence to the FTC method of testing cigarettes was the result of a voluntary agreement they entered into to stave off formal regulation and/or enforcement actions under the FTC's general authority to sanction "unfair or deceptive acts or practices in or affecting commerce" under § 5 of the FTC Act, 15 U.S.C. § 45(a). *See* FTC, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. 48158 (Sept. 12, 1997).

- Absent agreement by the manufacturers to use the FTC's test method, the FTC could not, as a matter of law, foreclose use of other methods unless it could prove that advertising their results would be unfair or deceptive under the FTC Act. As the D.C. Circuit held in *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 44 (D.C. Cir. 1985), "[b]ecause the FTC has not adopted its system of testing pursuant to a Trade Regulation Rule under section 18 of the FTC Act, 15 U.S.C. § 57a (1982), one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette."

- Although Philip Morris, following the Eighth Circuit's lead, insists that the FTC "'formally defined' 'low tar' cigarettes as those measuring 15 milligrams or less in tar according to the FTC Method," Br. in Opp. 5, neither Philip Morris nor the court below can cite any FTC regulation or other "formal" action of the Commission embodying such a definition. As the Commission itself has stated, "Cigarette manufacturers use a number of descriptive terms (such as 'low tar,' 'light,' 'medium,' 'extra light,' 'ultra light,' 'ultra low,' and 'ultima') in advertising and labeling information about their cigarettes. ... *There are no official definitions for these terms* but they appear to be used by the industry to re-

flect ranges of FTC tar ratings." FTC, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. at 48163 (emphasis added).

- The most that can be said is that the FTC at one point followed an *informal* enforcement policy of not taking action against cigarette companies that advertised cigarettes as "light" or "low tar" based on test results using the Cambridge method; but as Philip Morris itself acknowledges, the Commission has more recently begun an investigation, as yet unresolved, of whether such advertising is deceptive. Br. in Opp. 6.
- The United States is currently suing Philip Morris and other cigarette manufacturers for precisely the conduct that Philip Morris insists in this case it undertook as an agent of the federal government acting under color of federal office. The district court in that case has rejected the defendants' argument that they were merely following FTC mandates, noting that the advertisements in which they suggested that "light" cigarettes were less hazardous "*were certainly not mandated by the FTC.*" *United States v. Philip Morris*, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) (emphasis added).
- Most importantly, whatever the FTC may or may not have "directed" Philip Morris to do, Philip Morris does not claim—because it cannot—that the FTC ever *required* it to sell "low tar" cigarettes, or *compelled* it to call its cigarettes "lights," or otherwise *ordered* it to use advertising that would mislead consumers by suggesting, on the basis of measured tar and nicotine levels, that "light" cigarettes are somehow healthier than "regular" cigarettes.

B. Other Industries Face Much More Extensive, Specific, and Formal Regulation than Do Cigarette Companies.

The "regulation" of cigarette testing and advertising by the FTC is by no means "unique," "extraordinary" or "unusual" in its intrusiveness. Indeed, federal regulatory actions are typically much more formal and prescriptive than the FTC's actions regarding cigarettes. And although it may have been "unprecedented" *for the FTC* to involve itself in product testing to the degree it did with cigarettes (Br. in Opp. 18), detailed federal product-testing mandates are common, and are usually set forth in regulations with the force of law rather than adopted informally and by agreement with regulated companies, as in the case of the FTC's cigarette testing regime.

The National Highway Traffic Safety Administration (NHTSA), for example, conducts its own program of crash and rollover testing of automobiles, gives vehicles one- to five-star ratings as a result, and tells car manufacturers how to use those ratings in automobile advertising. *See* www.SaferCar.gov. NHTSA's testing activities, which are at least as extensive as the FTC's, are carried out not pursuant to voluntary agreements or informally adopted policies, but under a specific statutory mandate. 49 U.S.C. § 30168.

Moreover, unlike the FTC, NHTSA does more than merely test vehicles and instruct automakers concerning the use of those test results in advertising. It also formally promulgates specific design and performance standards for vehicles, known as Federal Motor Vehicle Safety Standards (FMVSSs). Those mandatory standards, codified at 49 C.F.R. Part 571, fill approximately 700 pages of the Code of Federal Regulations. FMVSSs typically specify not only what safety features manufacturers are required to install in vehicles and what standards of protection they must provide, but also exactly how manufacturers must *measure* their performance. For example, NHTSA's standard governing seatbelts and air-

bags, 49 C.F.R. § 571.208, which by itself is 87 pages long, prescribes exactly what crash tests manufacturers must conduct to test their passenger protection systems, including the speed and angle at which vehicles must be crashed, the forces that must be measured, and the precise "anthropomorphic test devices" (*i.e.*, crash-test dummies) that must be used.

Similarly, EPA regulations define exactly how automakers must test the fuel economy of their vehicles, and further provide for testing by the agency itself of a significant percentage of vehicles as a double-check on the manufacturers' own testing. *See generally* www.epa.gov/fueleconomy/index.htm; www.fueleconomy.gov/. Again, unlike the FTC's cigarette testing program, fuel economy testing is mandated by regulations with the force of law. *See* 40 C.F.R. Parts 86 & 600. And those regulations not only specify precisely how automakers must disclose fuel economy test results to consumers, but also define fleet fuel economy performance standards (CAFE standards) that the automobile industry is *required by law* to meet.

Such regulation is hardly confined to the automobile industry. Drug and medical device manufacturers must comply with standards governing the approval and marketing of new drugs and medical devices. Once approved, drugs and devices are subject to formal regulations that define their formulation and design and the manufacturing practices to which their makers must conform, as well as the precise contents of their labels. *See generally Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). Again, the regulatory scheme for drugs and medical devices differs from the FTC's cigarette testing program both in that it involves regulations with the force of law, and in that it directly regulates product design and production.

FDA regulations also set forth detailed product testing requirements that manufacturers are legally required to follow. For instance, the FDA has promulgated a regulation prescribing in detail how surgical gloves must be tested for

leaks, which calls not only for testing by manufacturers, but also for sampling and testing by the agency itself. 21 C.F.R. § 800.20. Unlike the FTC's test program for cigarettes, the FDA's testing has teeth: gloves that fail are "adulterated within the meaning of section 501(c) of the Federal Food, Drug, and Cosmetic Act, and are subject to regulatory action, such as detention ... and seizure ...." *Id.* § 800.20(d).

The FDA's glove regulation is by no means unusual. Other FDA regulations provide detailed testing and labeling requirements for tampons, 21 C.F.R. § 801.430, impact-resistant eyeglass lenses, *id.* § 801.410, hearing aids, *id.* § 801.420, and condoms. *id.* § 801.435. The tampon regulation, for example, requires manufacturers to use an absorbency test conforming to the detailed descriptions and diagrams set forth in the regulatory text, and to report the results on package labels using specifically defined terms. Again, the regulation has the force of law, and any noncomplying tampons are "misbranded" within the meaning of the Food, Drug, and Cosmetic Act.

Other consumer products are also subject to detailed regulatory testing regimes. Under regulations promulgated by the Department of Energy, 10 C.F.R. Part 430, manufacturers of refrigerators, freezers, dishwashers, water heaters, clothes washers and dryers, air conditioners, television sets, home heating equipment, kitchen ranges and ovens, fluorescent light tubes, showerheads, faucets, and toilets must use prescribed test methods to measure the energy and water consumption of their products. And unlike the FTC's cigarette testing program, the Energy Department's regulations not only require product testing, but also require that the products meet specific energy and water conservation standards.

The Consumer Product Safety Commission (CPSC), in addition to engaging in voluntary efforts to improve product safety similar to the FTC's interactions with cigarette companies, also promulgates mandatory safety standards for consumer products, ranging from bicycle helmets to lawn mow-

ers to cigarette lighters to baby cribs. Mandatory CPSC standards are formally promulgated as regulations and published in 16 C.F.R. Chapter II. Typically, they set forth design and/or performance standards that manufacturers are required to meet, and specify the exact test methods that must be used to determine compliance.

The CPSC's standards for flammability of children's sleepwear (sizes 7 through 14) are illustrative. The standards, set forth at 16 C.F.R. Part 1616, occupy 30 pages of the Code of Federal Regulations, and specify not only what criteria affected products must meet and how they must be labeled, but also how manufacturers must sample fabric for testing, how the testing must be conducted (including eight pages of engineering drawings describing the test chamber), what records the manufacturer must keep, the Commission's enforcement policy, the role of the Commission itself in testing, and the consequences of noncompliance. As to the latter, the regulations state that "[t]he Commission will test fabrics and garments subject to the standard for compliance with the standard ... [and] will consider any failing results from compliance testing as evidence of a violation of the standard and section 3 of the Flammable Fabrics Act (15 U.S.C. § 1192)." 16 C.F.R. § 1616.35(f).

As a final example, the Occupational Safety and Health Administration (OSHA), pursuant to the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq., formally promulgates regulations requiring employers to limit the exposure of their workers to hazardous substances and conditions. Those standards, which have the force of law, typically specify not only precise exposure limits, but also means of compliance and specific methods for exposure testing. For example, OSHA's recently promulgated rule on exposure to hexavalent chromium, 71 Fed. Reg. 10100 (Feb. 28, 2006), not only prescribes a precise exposure limit (5 micrograms of hexavalent chromium per cubic meter of air as an eight-hour time-weighted average), but also defines exactly the testing that

employers must use to determine compliance: "the employer shall use a method of monitoring and analysis that can measure chromium (VI) to within an accuracy of plus or minus 25 percent (+/- 25%) and can produce accurate measurements to within a statistical confidence level of 95 percent for airborne concentrations at or above the action level." *Id.* at 10375. In addition to requiring employers to monitor their compliance using specified methods, OSHA itself periodically tests employer compliance, and violation of its regulations can result in administrative sanctions.

We could go on. The point is that federal regulation of business activity is ubiquitous, and regulations that impose detailed testing and compliance requirements are commonplace. Indeed, if anything is "unique" and "unusual" about the FTC's testing of cigarettes, it is that it has *not* been imposed by regulations with the force of law, that it does *not* involve enforcement of any design or performance standards regarding the regulated products, and that it involves *no* enforceable regulations concerning the use of test results in cigarette advertising or marketing. No one who knew anything about federal regulation could possibly credit Philip Morris's (and the Eighth Circuit's) view that the "regulation" of cigarette companies by the FTC is "uniquely," "extraordinarily," or even "unusually" extensive.

C. Whether Broadly or Narrowly Applied, the Eighth Circuit's Ruling Will Have Mischievous Consequences.

Precisely because the federal "regulation" of cigarette testing and marketing has been so feeble compared to other federal regulatory regimes that impose enforceable legal requirements on their subjects, the Eighth Circuit's ruling is likely to lead other regulated businesses who are sued by consumers injured by their products to claim that they, too, "acted under" a federal officer. Indeed, medical device manufacturers have already done so, *see Parks v. Guidant Corp.*, 402 F. Supp.2d 964 (N.D. Ind. 2005), as have banks claiming

to be acting under federal officers by virtue of federal regulation of their lending practices. *See King v. Provident Bank*, __ F. Supp. 2d __, 2006 WL 902271 (M.D. Ala. April 6, 2006).

If the Eighth Circuit's decision remains intact, a number of undesirable consequences are likely. Courts that are persuaded by its view that mere regulation, if extensive enough, can justify removal, and that undertake a serious comparison of the degree of regulation faced by defendants in other industries with that faced by cigarette companies, may allow a broad range of defendants to remove cases under § 1442(a)(1), dramatically expanding the scope of federal removal jurisdiction. Alternatively, courts may grasp at the lifeline offered by the Eight Circuit's characterization of the Philip Morris case as "unique," "unusual," "extraordinary," and "unprecedented" and reject removal by defendants outside the cigarette industry even though, in reality, they face regulations much more extensive than cigarette companies. The district court's decision in *Parks* reflects the latter approach (as well as open skepticism as to the correctness of the Eighth Circuit's ruling).

It may be, as Philip Morris predicts, that the latter approach will predominate. We certainly hope so. But even if courts decline to extend the Eighth Circuit's unwise holding to other industries, much time and effort will be expended litigating meritless removals. And, at the end of the day, the cigarette companies will be left with a special benefit not available to other more heavily regulated (and less culpable) industries. A decision creating an unprincipled exception to ordinary jurisdictional rules for the benefit of a single industry should not be left standing by this Court.

CONCLUSION

Most people, including most lawyers, would probably be surprised if not shocked to learn that Philip Morris had successfully availed itself of a removal provision designed for

protection of federal officers, employees, and agents. Their incredulity would only be heightened by the facts that the federal government is itself suing Philip Morris for the very actions the company claims were done under federal direction, and that the government has shown no sign of supporting Philip Morris's entitlement to removal (unlike most other federal officer removal cases heard by this Court, where the United States *represented* the removing party). And the assertion that cigarette companies are entitled to removal because they have faced more extensive regulation than other industries would seem merely laughable—if it had not been accepted by a United States Court of Appeals.

For the reasons stated above, and by the petitioner, the Eighth Circuit's decision merits review and correction. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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JOINT APPENDIX

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Order of the United States Court of Appeals Granting Petition for Interlocutory Appeal, *Watson, et al. v. Philip Morris Cos., Inc., et al.*, No. 03-8023EALR (Jan, 28, 2004)..... 334

NOTICE

The following documents have been omitted in the printing of this Joint Appendix but may be found in the appendix to the petition for a writ of certiorari filed in this case:

Opinion of the United States Court of Appeals for the Eighth Circuit, *Watson, et al. v. Philip Morris Cos., Inc., et al.*, No. 04-1225 (Aug. 25, 2005) 1a

Order of the United States District Court for the Eastern District of Arkansas, *Watson, et al. v. Philip Morris Cos., Inc., et al.*, No. 4:03-CV-519-GTE (Dec. 12, 2003) 20a

Order Denying Petition for Rehearing of the United States Court of Appeals for the Eighth Circuit, *Watson, et al. v. Philip Morris Cos., Inc., et al.*, No. 04-1225 (Nov. 18, 2005) 61a

First Amended Class Action Complaint, *Watson, et al. v. Philip Morris Cos., Inc., et al.*, Case No. CV03-4661 (Pulaski Cty., Ark. Cir. Ct. filed May 29, 2003) 62a

Notice of Removal, *Watson, et al. v. Philip Morris Cos., Inc., et al.*, No. 4:03-CV-519-GTE (E.D. Ark. filed July 2, 2003) 74a

Statutory Provisions Involved 98a

Letter from Supreme Court Clerk regarding extension request for filing a petition for a writ of certiorari (Feb. 9, 2006) 100a

Letter from Supreme Court Clerk regarding second extension request for filing a petition for a writ of certiorari (Mar. 14, 2006) 101a

CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

No. CV 2003 004661

LORETTA LAWSON AND LISA WATSON,
Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION;
AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Defendants.

APPEARANCE AND EXECUTION DOCKET

DATE	DOCKET ENTRY
4/18/03	Complaint (Civil Cases) 100.00Pd
5/29/03	Amended Complaint
	* * * * *
7/2/03	Notice of Removal: Philip Morris USA Inc.
7/22/04	Notice of Withdrawal of Lead Plf Loretta Lawson: Plf Loretta Lawson
7/22/04	Motion to Dismiss Loretta Lawson
	S Gene Cauley

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

Case No. 4:03-CV-00519-GTE

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., AND PHILIP MORRIS, INCORPORATED,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
7/2/03	1	NOTICE of Petition for Removal from Pulaski County Circuit Court; Case Number: CV03-4661; filing fee of $150.00 pd, receipt #108478 (kjp) (Entered: 07/03/2003)
7/2/03		COMPLAINT (kjp) (Entered: 07/03/2003)
7/2/03		FIRST AMENDED CLASS ACTION complaint with jury demand [0-1] by plaintiff; adding Lisa Watson (kjp) (Entered: 07/03/2003)
7/10/03	2	ANSWER of Philip Morris USA Inc. to plaintiffs' first amended class action complaint with jury demand (rjh) (Entered: 07/11/2003)

* * * * *

8/1/03	4	MOTION by pltfs for remand to Circuit Court of Pulaski County (rjh) Modified on 08/04/2003 (Entered: 08/04/2003)
8/1/03	5	MEMORANDUM OF LAW by pltfs in support of motion for remand to Circuit Court of Pulaski County [4-1] (rjh) (Entered: 08/04/2003)

* * * * *

8/22/03	7	MEMORANDUM IN OPPOSITION TO PLTFS' MOTION FOR REMAND by defts [4-1] (exhb attached) (rjh) (Entered: 08/25/2003)

* * * * *

9/12/03	10	REPLY memorandum of law in support of pltfs' motion to remand to the Circuit Court of Pulaski County, Arkansas [4-1] by pltfs (rjh) (Entered: 09/15/2003)
11/10/03	11	MOTION by pltfs for class certification (rjh) (Entered: 11/12/2003)
11/10/03	12	MEMORANDUM OF LAW by pltfs in support of motion for class certification [11-1] (rjh) (Entered: 11/12/2003)
11/18/03	13	DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF ADDITIONAL Authority regarding pltfs' motion to remand [4-1] (rjh) (Entered: 11/19/2003)

* * * * *

11/20/03		CLERK'S MINUTES: ORAL ARGUMENT before Judge G. Thomas Eisele on Motion to Remand. Court takes under advisement. (Court reporter, Elaine Hinson) (cjw) (Entered: 11/20/2003)

12/11/03	19	ADDENDUM & additional documentation regarding the voluntary agreement in support of defts' memorandum in opposition to pltfs' motion for remand (exhibits #66 through #71) (rjh) (Entered: 12/11/2003)
12/12/03	20	MEMORANDUM OPINION AND ORDER by Judge G. T. Eisele for the reasons & findings stated herein, pltfs' motion for remand to Circuit Court of Pulaski County [4-1] is denied; pltfs' request (contained in Doc #2) for costs & fees is denied; ordered that the controlling question on this case is designated for interlocutory appeal under 1292(b) & pltfs shall have 10 days to file an applic for interlocutory review with USCA; upon filing applic, proceedings in this Ct will be stayed; the date on which defts' resp to pltfs' mot for class cert is due shall be extended; if stay comes into effect, defts' resp to mot for class cert need not be filed until 14 days after Eighth Circuit final action upon pltfs' applic; if pltfs do not seek interlocutory appeal, defts' resp is due no later than 14 days after expiration of the ten day period in which pltfs have to file an applic for interlocutory review (cc: all counsel) (rjh) (Entered: 12/15/2003)
12/30/03	21	NOTICE by plaintiffs of filing petition for interlocutory appeal (dac) (Entered: 12/31/2003)
12/30/03	22	TRANSCRIPT (1 volumes) of proceedings for the following date: 11/20/03 oral argument on motion to remand (dac) (Entered: 12/31/2003)

1/5/04		DOCKETING LETTER: 8 USCA Number 03-8023; petition for permission to appeal pursuant to 28USC section 1292(b) has been filed (dac) (Entered: 01/05/2004)
2/2/04		DOCKETING LETTER: 8 USCA Number 04-1225; petition for permission of Lisa Watson, et al to take an interlocutory appeal is granted (dac) (Entered: 02/02/2004)
		* * * * *
12/5/05	24	MANDATE USCA8 re 1292(b) appeal of 20 Order on Motion for Relief is affirmed in accordance with the opinion of this Court (Attachment: # 1 Opinion) (dac) (Entered: 12/08/2005)
		* * * * *
1/18/06	36	MOTION to Stay Proceedings Pending Supreme Court Resolution of Plaintiffs' Petition for Certiorari 25 by Plaintiffs (rjh) (Entered: 01/18/2006)
1/18/06	37	MEMORANDUM IN SUPPORT filed by Plaintiffs of their 36 Motion to Stay Proceedings Pending Supreme Court Resolution of Plaintiffs' Petition for Certiorari. (rjh) (Entered: 01/18/2006)
1/30/06	38	ORDER IMPOSING STAY that Plaintiffs' Motion 36 is GRANTED and all proceedings in this case are stayed until directed otherwise by this Court; parties are directed to notify the Court upon resolution by the U. S. Supreme Court of the pending Petition for Certiorari. Signed by Judge G. Thomas Eisele on 1/30/06. (rjh) (Entered: 01/30/2006)
		* * * * *

1/30/06	39	CERTIFICATE OF MAILING by the Clerk re 38 Order Staying Case (rjh) (Entered: 01/30/2006)
4/24/06	40	Letter from U. S. Supreme Court, petition for a writ of certiorari was filed on 4/7/06 and placed on the docket 4/10/06 as No. 05-1284 (dac) (Modified entry on 4/26/2006 to correct the placed on docket date to 4/10/06) (bfw). (Entered: 04/26/2006)
4/26/06		NOTICE OF DOCKET CORRECTION: 40 Letter – (modified entry to correct the placed on docket date to 4/10/06) (bfw) (Entered: 04/26/2006)
1/17/07	41	LETTER RESPONSE re 38 Order Staying Case filed by Philip Morris Companies, Inc. and Philip Morris Incorporated. (thd) (Entered: 01/17/2007)
1/17/07	42	NOTICE of Action on Plaintiffs' Petition for Certiorari in Response to 38 Order Staying Case filed by Loretta Lawson and Lisa Watson. (thd) (Entered: 01/17/2007)
1/29/07	43	WRIT of Certiorari is granted by the Supreme Court (dac,) (Entered: 01/30/2007)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1225

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION, AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Defendants-Appellees.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
1/28/04	Civil Case Docketed. Dist. Ct. Office: Little Rock, Arkansas
1/28/04	CASE TRANSFERRED – Petition for interlocutory appeal and respondent's answer.
	* * * * *
3/22/04	BRIEF FILED – Brief of Appellant-Loretta Lawson 25 pages w/addendum 10 copies – w/service 3/19/04. [04-1225] [1749375]
	* * * * *
4/19/04	BRIEF FILED – Brief of Appellee – Philip Morris. 13,719 words w/addendum

– 10 copies – w/service 4/19/04. w/disk [04-1225] [1758605]

* * * * *

5/4/04 BRIEF FILED – Reply brief – Lisa Watson, Loretta Lawson. 6 pages 10 copies – w/service 5/3/04. w/diskette [04-1225] [1763671]

* * * * *

11/15/04 ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES William J. Riley, Circuit Judge, John R. Gibson, Circuit Judge, Raymond W. Gruender, Circuit Judge. Marcus Neil Bozeman for Appellants Loretta Lawson, Appellants Lisa Watson. Amy Phillips Rosenthal for Appellees Philip Morris, Appellees Philip Morris. Rebuttal by: Marcus Bozeman. RECORDED. [04-1225]

* * * * *

2/25/05 28(j) citation received and filed from Appellees Philip Morris, Appellees Philip Morris TO COURT [04-1225] [1872104]

8/25/05 THE COURT: William J. Riley, John R. Gibson, Raymond W. Gruender. OPINION FILED by John R. Gibson, Authoring Judge CONCUR by Raymond W. Gruender. PUBLISHED. [04-1225] [1944316]

8/25/05 JUDGMENT: William J. Riley, John R. Gibson, Raymond W. Gruender. The judgment of the lower court is AFFIRMED in accordance with the opinion. [04-1225] [1944318]

* * * * *

9/22/05	PETITION for REHEARING with petition for rehearing en banc. Filed by Appellants Lisa Watson, Appellants Loretta Lawson, w/service 9/21/05. TO COURT [04-1225]
9/29/05	MOTION of amicus curiae, Public Citizen Inc. and AARP, for leave to file brief in support of appellants' petition for rehearing. [04-1225] [1958002], TO COURT w/service 9/28/05
9/29/05	MOTION of amici curiae, Campaign for Tobacco-Free Kids, American Lung Association, American Heart Association, American Cancer Society, and Michael Pertschuk, for leave to file brief in support of petition for rehearing en banc. [04-1225] [1960363], TO COURT w/service 9/29/05
10/3/05	Clerk letter sent notifying that party has an opportunity to respond to petition for Rehearing with petition for rehearing en banc filed by Lisa Watson, Loretta Lawson [1955145-1] [04-1225] Response due by 10/13/05
10/7/05	MOTION of aplee, Philip Morris, to strike amici curiae's reliance on extra-record evidence [04-1225] [1961429], TO COURT w/service 10/7/05
10/13/05	RESPONSE to petition for Rehearing with petition for rehearing en banc filed by Lisa Watson, Loretta Lawson [1955145-1] [1963028]. Response filed by Philip Morris. w/service 10/13/05 TO COURT [04-1225]

10/21/05	RESPONSE of amicus curiae, Public Citizen, Inc., and AARP, in opposition to appellee motion to strike amici curiae's reliance on extra-record evidence filed by Philip Morris [1961429-1] [04-1225] [1966230]. TO COURT
10/24/05	RESPONSE of amici curiae, Campaign for Tobacco-Free Kids, American Lung Assoc., American Heart Assoc., American Cancer Society, and Michael Pertschuk in opposition to appellee motion to strike amici curiae's reliance on extra-record evidence filed by Philip Morris [1961429-1] [04-1225] [1967595]. TO COURT
11/2/05	JUDGE ORDER: granting amicus motion filed by Public Citizen and AARP for leave to file brief in support of appellant's petition for rehearing [1958002-1] [04-1225] [1970311], denying amicus motion filed by Tobacco-Free Kids, American Lung Assoc., American Heart Assoc., American Cancer Society and Michael Pertschuk for leave to file a brief in support of petition for rehearing [1960363-1] filed [04-1225] [1970311] The brief of amici curiae Public Citizen and AARP is redacted to excise references to briefs filed in other cases which were not included in the record on appeal.
11/2/05	ADDITIONAL PETITION for REHEARING with petition for rehearing en banc. Filed by Amici on behalf of Appellant Public Citizen, Amici on behalf of Appellant AARP, w/service 9/28/05. [1970426], TO COURT [04-1225]

11/18/05	JUDGE ORDER: denying petition for Rehearing with petition for rehearing en banc [1955145-1] filed by Lisa Watson, Loretta Lawson. Petition for panel Rehearing is also denied. [04-1225] Judge Arnold and Judge Bye would grant the petition for rehearing en banc. [1976549] – Published Order.
12/2/05	MANDATE ISSUED [04-1225]

* * * * *

2/27/06	Supreme Court notice received extending time to file petition for writ of certiorari until March 20, 2006. [04-1225]
3/20/06	Supreme Court notice received extending time to file petition for writ of certiorari until 4/17/06. [04-1225]
4/14/06	U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on April 7, 2006. Supreme Ct. Case No.: 05-1284 [04-1225] [2035669]
1/16/07	SUPREME COURT order filed granting cert petition. Order filed on 01/12/2007. [3272613] [04-1225]

FEDERAL TRADE COMMISSION
WASHINGTON 25

Bureau of Consultation

DEC 17 1959

Mr. John Vance Hewitt,
Conboy, Hewitt, O'Brien & Boardman,
39 Broadway,
New York 6, N.Y.

Re: Tar and Nicotine Claims

Dear Mr. Hewitt:

To confirm my telephone call of December 15, we wish to advise that all representations of low or reduced tar or nicotine, whether by filtration or otherwise, will be construed as health claims. No hedging statements, such as taste or sales volume qualifications, will be considered as changing the character of reduction claims. Our purpose is to eliminate from cigarette advertising representations which in any way imply health benefit.

This advice is being disseminated on an industry-wide basis and prompt, simultaneous compliance is urgently requested. Any advertising which is not promptly brought into conformance with this request will be forwarded to other Bureaus looking forward to mandatory procedures. As always, the services of this Bureau are available to cigarette advertisers to confer on proposed advertising.

Please advise this office at the earliest possible time of your client's willingness to make necessary changes in the present advertising of any and all of its brands to comply with this request.

Very truly yours,
/s/
William H. Brain,
Attorney.

FEDERAL TRADE COMMISSION

REPORT TO CONGRESS

Pursuant To The
Federal Cigarette Labeling and Advertising Act

June 30, 1968

The 1967 Cigarette Report noted the possibility that cigarette advertisers play important roles as social arbiters. 32/ Exposition if not outright espousal of values has become a prominent feature in current cigarette advertising. Thus,

> Be up-to-date: "You're a part of the right now . . . everything about True says right now". Avoid Alienation: "don't go out without your Lark pack . . . if you're ready to show your pack, the Lark truck will see you" and "you too, join the crowd that smokes the number one in 'good taste' . . . Winston". Persevere: "not long ago if you smoked a reduced tar and nicotine cigarette you were pretty much alone in the world . . . you're not alone anymore" (True).
>
> Be aristocratic: with a connoisseur's eye, Sir Arthur Smith trades his Rolls Royce for a pack of Newports, "The smoothest (taste) that's ever been bred". Chesterfield filters are savored by a wine taster who pronounces their taste "suave, aristocratic, great finesse". Be patriotic (and egalitarian): "afterall, in this country, it's what you are, not who you are that counts" (Century 100s). Be cosmopolitan: "the first filter cigarette to combine rich American taste with handsome European styling" (Half and Half).

Presumably not all the values depicted represent those of the advertisers, e.g. "I bold, brawny, Bob Bevans am a flavor grabber" (L&M). In an L&M commercial taking place aboard ship, the object is to 'see how many [L&M's] are grabbed in the next 50 seconds". In one commercial, the taste of Kents drives a man to larceny but in another delivers him from a career of gambling.

Certain commercials seek to associate their product with a mood. There is the "male whimsy" of Camel advertising, in which men with wondering souls travel from Kilimanjaro to Maine, a mile and yet a mile and a half onward, buying Camels and displaying holes in their soles.

As has been duly noted, cigarette advertising can lend itself to flights from reality.

Marlboro Country continues "traditional male heroic" and moored to the range—"you know when one's missin! Without countin', you know . . . this is Marlboro Country. Where a good colt is as important today as it was a hundred years ago".

There was a time when tribulations befell Salem Country. Replaced by appeals to urbanites ("you can take Salem out of the country . . .") and invaded by the hard sell ("that last cigarette was pretty tasteless—try Salem—taste now—talk later"), Salem Country when last sighted recommenced a definite bucolic upbeat, replete with jodhpur clad damsels with beaux and sorrels.

The Parliament Night People started the year characteristically ("let's find a new place for dinner, OK? . . . Meet the Night People . . . This is their style. They look for atmosphere"), but in the end gave way to sardonic Englishmen, given to having the last word over the mainstream of Parliament cigarettes.

Assuaging Anxiety

For good reason, there is concern that cigarettes are hazardous to health. 33/ Consequently, it is important to advertisers of cigarettes that this concern be allayed. Attempts by cigarette advertisers to dispel worry or anxiety over the health consequences of smoking have met with considerable success. 34/

While recognizing that smoking any cigarette is hazardous, the Surgeon General of the United States has clearly indicated that some cigarettes may be less hazardous than others. Thus, he has stated that "in recent years, the harmful effects of tar and nicotine in cigarette smoke have been the subject of intensive scientific research here and abroad." There is evidence that tar . . . is many times more potent in its cancer-producing properties than any of the substances isolated from it." 35/ A committee appointed by the Surgeon General has concluded that "the preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful are the effects." 36/

Based upon the proposition that lower yield cigarettes present a lessened hazard to the American public, the Commission has acted within the past year to (1) augment information available to the public on the tar and nicotine content of cigarettes and (2) prompt cigarette manufacturers to develop less hazardous cigarettes.

On May 15, 1967, Chairman Paul Rand Dixon announced the activation of a Commission cigarette testing laboratory. Testing procedures to be utilized by the laboratory were announced on August 1, 1967. On October 26, 1967, the Commission issued a policy statement which indicated that as a general rule the Commission would not challenge statements or representations of or relating to tar and nicotine content or cigarettes "where they are shown to be accurately and fully substantiated by tests conducted in ac-

cordance with the standardized testing methods and procedures used by the Federal Trade Commission".

Shortly thereafter, on November 22, 1967, the Commission published test results on the tar and nicotine yields of 59 varieties of cigarettes—these included varieties having the greatest sales at the time and those whose labeling or advertising contained tar or nicotine yield statements. Only two varieties made yield claims lower than those published by the Commission and in both instances, the advertisers voluntarily corrected the situation. Unofficial information has been received that the November 22, 1967 test results were carried on the front pages of three out of four of all major daily newspapers in the United States. Many hundreds of thousands of copies were reproduced and distributed by the Public Health Service, the American Cancer Society and other health agencies.

As recently as mid-June of 1968 the Commission released test results of the tar and nicotine yields of virtually all brands marketed domestically, 127 in number. Advertisers now have available for use in their advertising, information concerning the tar and nicotine levels of their and competitive brands. Their use of this information must be factual, fair and not misleading. The ORC-ACS Survey indicated that 62% of all interviewees think that the amount of tar and nicotine should appear both on the cigarette pack and in advertising; an additional 14% think that such information should appear on the pack only. 37/ Since the establishment of the Commission's laboratory, cigarette manufacturers have changed thirty-eight 38/ different varieties of cigarettes with respect to filters, filter overwraps, blends, etc., in an effort to lower tar and nicotine yields. We know of no attempts to produce cigarettes with higher yields.

An analysis of sales data provided by cigarette manufacturers indicates that sales of comparatively low yield cigarettes, e.g., for purposes of this report only, those having 15 milligrams (mg.) of tar or less, have not been extensive thus

far. Three categories of cigarettes, classified according to tar yields, divided the market in 1967 as follows: 15 mg. and under – 2%; 16 - 21 mg. – 59%; 22 mg. and over – 39%.

In promoting the above-noted 2% of the market, cigarette advertisers spent 5.5% of their total 1967 advertising budget. During the first two months of 1968, cigarettes with tar content of 15 mg. and under accounted for 2.4% of the market and 7.8% of total advertising expenditures. Perhaps the trend noted in connection with filter and 100 millimeter cigarettes has commenced with respect to low yield cigarettes—manufacturers are spending disproportionately large amounts to promote them with the result that their market share increases each year.

There is every reason to believe that the promotion of low tar and nicotine yield cigarettes can be profitable. As indicated, the Commission released tar and nicotine figures for 59 varieties of cigarettes in late November 1967. These figures indicated that regular and king-sized filter Marvels were lowest in tar and nicotine of the 59. They also indicated that Cascade was lowest among menthol cigarettes. The sales of these three brands rose respectively 382%, 570% and 200% in December 1967, despite the fact that overall cigarette sales declined in December (from November) in 1967, 1966 and 1965. Furthermore, both True and Carlton cigarettes, two well advertised low yield cigarettes, each increased sales 20% that December following publication of Commission figures.

The only brands making tar or nicotine content disclosures in advertising or labeling at the time of the 1967 Cigarette Report were Carlton, True, Marvels, Cascade, King Sano, and Duke of Durham filters. 39/ To these may now be added Domino menthols, Montclair, Silva Thins, and Tryon filters.

As noted in the 1967 Cigarette Report, rather than alert smokers to less hazardous low yield cigarettes, advertisers

sought for the most part to allay smoker anxiety by proclaiming the wonders of their filters. 40/ The PHS Survey revealed a plausible reason for this—the belief is widely held that filter cigarettes are less hazardous to health than nonfilter cigarettes. 41/

Now that the Commission has tested nearly every cigarette on the market, an evaluation of this belief is possible. Concerning the 127 varieties tested, the lowest 34 in tar content are all filter cigarettes and the highest six are all nonfilter cigarettes. However, the nonfilter cigarette ranking 35th lowest in tar is lower in tar than no fewer than 62 other filter cigarettes. Furthermore, it would appear that 95 millimeter, filter Pall Mall spews slightly more tar than king size, nonfilter Pall Mall and that regular size, nonfilter Chesterfield spews slightly less tar than 101 millimeter, filter Chesterfields. 42/ Obviously, the consumer cannot rely on the filter alone.

Nevertheless, the implied safety of a filter ("the mere addition of a filter to a cigarette is, in and of itself, some kind of claim or assurance relating to the health aspects of smoking" 43/) and the miraculous way in which it delivers taste continue to be the advertisers' principal palliative against smoker misgivings. Examples include:

> "the flavor of the world's finest tobaccos through the Kent filter"; "the charcoal granules make the taste better" (Lark); "white filter flavor" (L&M); "a filter cigarette blended with natural flavor fresheners" (Viceroy); "Kool's white filter . . . menthol through a filter."

Some filters are tasty enough to do without tobacco ("You don't even have to light it to like it"—Lucky Strike 100s).

The implication that "filter" equals "comparative safety" can be made more express through depictions of the complicated inner workings of the filter (True, Tempo, Lark, Lucky Strike 100s) or by euphemisms such as "mild", "soft", e.g.

"flavor comes through filtered mild" and "charcoal to soften the taste" (Lucky Strike 100s), "the charcoal filter smoothes the taste" (Tareyton), "air cooled filter, a great light taste" (Carlton).

The Pall Mall advertisements, "Look! it's extra long at both ends. More fine tobacco at one end. And an extra long filter at the other. So it travels the smoke further for greater mildness" and "filter[s] further for a milder smoke", combine several approaches. The implicit assurance of the word "filter" is there, made more explicit, by "an extra long filter" and through the euphemism "travels the smoke further for greater mildness" (emphasis added). The further thought is projected that such euphemistic mildness comes from the longer filter and more tobacco, i.e. "extra long at both ends . . . filter[s] further for greater mildness".

News Release

Federal Trade Commission

Washington, D.C. 20580

OFFICE OF INFORMATION 393-6800 Ext. 197

For *RELEASE*: IMMEDIATE, Friday, March 25, 1966

The Federal Trade Commission today announced that it has sent identical letters to each of the nation's major cigarette manufacturers and to Mr. Robert B. Meyner, Administrator of The Cigarette Advertising Code, Inc., in regard to factual statements of tar and nicotine content on labels and in advertising of cigarettes. The text of the letter is as follows:

Gentlemen:

> The Cigarette Advertising Guides promulgated by the Commission in September 1955 provided that no representation should be made that "any brand of cigarette or the smoke therefrom is low in nicotine or tars * * * when it has not been established by competent scientific proof applicable at the time of dissemination that the claim is true, and if true, that such difference or differences are significant." On the basis of the facts now available to it, the Commission has determined that a factual statement of the tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette would not be in violation of such Guides, or of any of the provisions of law administered by the Commission so long as (1) no collateral representations (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the public) are made, expressly or by implication, as to reduction or elimination of health hazards, and (2) the statement of tar and

nicotine content is supported by adequate records of tests conducted in accordance with the Cambridge Filter Method, as described in ar. article entitled "Determination of Particulate Matter and Alkaloids (as Nicotine) in Cigarette Smoke," by C.L. Ogg, which appeared in the Journal of the Association of Official Agricultural Chemists, Vol. 47, No. 2, 1964. It is the Commission's position that it is in the public interest to promote the dissemination of truthful information concerning cigarettes which may be material and desired by the consuming public.

By direction of the Commission.

Joseph W. Shea,
Secretary.

REVIEWING PROGRESS MADE TOWARD THE DEVELOPMENT AND MARKETING OF A LESS HAZARDOUS CIGARETTE

HEARINGS
BEFORE THE
CONSUMER SUBCOMMITTEE
OF THE
COMMITTEE ON COMMERCE
UNITED STATES SENATE
NINETIETH CONGRESS
FIRST SESSION

August 23, 24, and 25, 1967

Serial No. 90-52

* * *

THE SECRETARY OF HEALTH,
EDUCATION, AND WELFARE
Washington, January 10, 1967

HON. WARREN G. MAGNUSON,
U.S. Senate, Washington, D.C.

DEAR SENATOR MAGNUSON: In response to your letter of November 9, 1964, I am pleased to forward to you a copy of a technical report by the Public Health Service reviewing the significance of the "tar" and nicotine content of cigarette smoke. This report was in the process of preparation at the time of my last letter to you in July and I regret this long delay in putting it in your hands. The report reflects the general considerations which went into the thinking of the committee whose recommendations to the Surgeon General were transmitted to you earlier.

In our opinion, requiring the identification of "tar" and nicotine levels on packages and in advertising, as you have proposed, would be an important step and would result in the progressive reduction of "tar" and nicotine levels because of public demand.

On the basis of available evidence regarding the effects of individual constituents of cigarette smoke, their relationship to the overall hazards of cigarette smoking, and the relative precision regarding measurement techniques, the identification of "tar" and nicotine levels can provide valuable information on overall dosage. In considering any labeling requirement, it would be important that such requirement allow for the addition of other components of cigarette smoke as they are identified as a hazard and when agreement is reached on appropriate measurements to be used.

I strongly support your view that these steps relating to the measurement and labeling of "tar" and nicotine in cigarette smoke are only part of our overall approach to this problem. As you have pointed out, until hazardous substances can be removed from cigarette smoke, the only effective means available to eliminate the health hazards associated with smoking is an educational program designed to inform people of the hazard and encourage people to stop or not to start smoking.

I hope that this letter and the attached technical report will prove helpful.

Sincerely,

JOHN W. CLAIBORNE,
Secretary.

"Public Health Service Technical Report on 'Tar' and Nicotine

"It is clear that the overall risk associated with cigarette smoking increases as the average number of cigarettes consumed per day increases (1). In the studies which have reported other measures of exposure such as pack years, degree of inhalation, and maximum level of cigarette consumption, the same type of relationship holds.

"Hammond (2) has shown that users of high 'tar' and nicotine cigarettes report significantly more of the symptoms that are characteristic of cigarette smokers in general. Gratiani et al (3) have shown that appreciable variations in 'tar' yield of cigarettes may be achieved by changing the pattern of smoking with maximum yield being obtained when puffing is concentrated toward the end of the cigarettes. The effect of tobacco smoke condensate on the mouse skin has been shown by numerous investigators to be dependent on the dose of tar applied to the skin.

"These findings support the existence of a dose-response relationship between exposure to cigarette smoke and the risks most clearly associated with cigarette smoking—lung cancer, chronic obstructive pulmonary diseases, and cardiovascular diseases. Among the factors which may enter into the total exposure are numbers of cigarettes consumed, length of cigarette consumed, pattern of smoking (relative concentration of puffing at beginning, middle, or end of cigarette), frequency and depth of inhalation, and concentration of tobacco smoke which enters the smoker's mouth. The concentration of particulate matter in the mainstream of smoke is reflected in the measurement of the so-called 'tars' in tobacco smoke.

"The epidemiologic evidence on the effect of cigarette smoking on health is based largely on numbers of cigarettes consumed daily as the measure of exposure. That the degree of risk correlates as high as it does with numbers of cigarettes

probably reflect the fact that the various measures of exposure noted above tend to be positively later correlated. Those individuals who smoke many cigarettes, and also, who inhale frequently and deeply, take more puffs, use higher 'tar' and nicotine content cigarettes, and so on.

"Wynder and Hoffmann (4) have shown that the tumorigenicity of cigarette smoke can be reduced by alternation in the cigarette which reduces the 'tar' and nicotine content. They use the term 'indicator' for 'tar' and nicotine content or other measures which reflect this type of gross relationship lacking the identification of specific agents which are responsible for the effect. Bock, Mourn, and Clark (5) have independently shown a similar variation in carcinogenic activity of tobacco 'tar' obtained from different types of cigarettes.

"The ad-hoc group of scientists which reviewed and discussed these data recently at the invitation of the Surgeon General concluded that:

"1. The preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful would be the effect.

"2. We recommend to the Surgeon General that action be encouraged which will result in the progressive reduction of the 'tar' and nicotine content of cigarette smoke.

"This judgment was arrived at with full recognition of the following:

"1. It is possible for a cigarette to be altered in such a way that its 'tar' and nicotine content is reduced but certain other harmful effects, for example, the effect of the gaseous phase may be increased. Although this is a theoretical possibility, there is no evidence that this has occurred to any serious degree.

"2. The potential benefit to the individual consumer who might shift to a lower tar and nicotine cigarette would be negated if this shift were accompanied by an increase in the

number of cigarettes consumed, or in the length of each cigarette used. There is evidence that, by-and-large, this does not occur, that the shift to low 'tar' and nicotine cigarettes tends to be accompanied by the same level of consumption or an even lower level rather than by an increased consumption (0.7).

"3. Promotion of a low 'tar' and nicotine cigarette might lull the consumer into believing that he could smoke this kind of cigarette without *any* accompanying risk. The presence of the warning label on the package, control over the advertising statements which are permitted, and the continuing educational efforts of public health agencies on this subject should minimize this likelihood."

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* * *

FEDERAL TRADE COMMISSION

CIGARETTES AND RELATED MATTERS

Methods To Be Employed in Determining Tar and Nicotine Content; Notice of Public Hearing

Notice is hereby given that the Federal Trade Commission will hold a public hearing before the full Commission on November 30, 1968, commencing at 10 a.m., e.s.t. in Room 532, Federal Trade Commission Building, Sixth Street and Pennsylvania Avenue NW., Washington, D.C., at which time and place all interested and affected parties may verbally present data, views, arguments and suggestions relevant to the manner of testing cigarettes to determine their tar and nicotine content and the reporting of the results of such tests. Written data, views, arguments and suggestions will also be made a part of the public record and considered if mailed to Mr. Joseph W. Shea, Secretary, Federal Trade Commission, Sixth Street and Pennsylvania Avenue N.W., Washington, D.C. 20580, on or before November 30, 1968. Persons submitting written presentations exceeding two pages should file 12 copies thereof, and any person desiring to make oral presentation at the hearing on November 30, 1968, should notify the Secretary of the Commission to this effect, with an estimate of the time required for his presentation, not later than November 21, 1968.

The purpose of this hearing is to establish a public record to assist the Commission in determining what action, if any should be taken in the public interest with respect to modifying or amplifying the Cambridge Filter Method, as described

in an article entitled "Determination of Particulate Matter and Alkaloids (as Nicotine) in Cigarette Smoke," by C.L. Ogg, which appeared in the Journal of the Association of Official Agricultural Chemists, Vol. 47, No. 2, 1964, to determine tar and nicotine yields of cigarette smoke, and the form in which such results should be expressed in the public interest. This method was specified by the Commission on March 25, 1966, as that to be used to support any factual statements of tar and nicotine content of the mainstream smoke of cigarettes. The public record to be established will assist the Commission in reaching informed determinations with respect to the manner in which its laboratory will be operated, and related questions.

The Commission solicits information and suggestions on the following questions:

1. Whether the butt-length to which test cigarettes are smoked should be 23 mm for nonfilter cigarettes, and the length of the filter and overwrap plus 3 mm for filter cigarettes if such combined length is more than 23 mm;

2. Whether the total particulate matter should be reported on a "wet" or "dry" basis, and if the latter whether the gas chromatography method published by C.H. Sloan and B.J. Sublett, "Moisture Content of the Particulate Phase of Smoke from Filter and Nonfilter Cigarettes," in Tobacco Science 9, page 70, 1965, as modified by F.J. Schultz and A.W. Spears report "Determination of Moisture in Total Particulate Matter" published in Tobacco Vol. 162, No. 24, page 32, dated 17 June 1966, should be employed to determine the moisture content;

3. Whether test results should be reported in terms of whole numbers or whole numbers and fractions of milligrams, or a range, or a figure accompanied by the standard deviation with an explanation; and

4. The number of cigarettes to be smoked necessary to produce reliable results, and the size and geographic distribu-

tion of the sample from which such test cigarettes are selected.

Interested persons are invited to submit any information pertinent to these questions or other aspects of the subject.

The data, views, or arguments presented orally or in writing will be available for examination by interested parties at the Federal Trade Commission, Washington, D.C.

Issued: November 3, 1966

By the Commission

[SEAL] JOSEPH W. SHEA
Secretary.

* * *

Before the
Federal Trade Commission

CIGARETTES AND RELATED MATTERS

Methods To Be Employed in Determining
Tar and Nicotine Content

SUPPLEMENTARY OBSERVATIONS FOLLOWING
NOVEMBER 30, 1966 HEARING

The written submissions and oral discussions at the November 30, 1966 Hearing, indicate that many of those concerned had wholly different approaches, technical understanding, working knowledge of the actual use or inherent limitations or required laboratory equipment, or appreciation of the scientific predicates underlying the Cambridge Filter Method whose modification or amplification was being considered.

This Memorandum endeavors in simple form to expose and to clarify the complex technological procedures involved in testing the amount of particulate matter (PM) and nicotine in cigarette smoke. That background must be appreciated by anyone responsible for resolving the various points relating to testing which the Commission has under consideration.

What Is Being Measured?

Whether you call it "tar" or particulate matter (PM), the so-called Ogg Method, employing the Cambridge filter, seeks to determine the non-vapor material in cigarette smoke as generated in the automatic standardized smoking of a cigarette by a machine, not by a human being, according to necessary prescribed standard technical directions.

The weight of the material so drawn in the machine smoking of the cigarette is calculated by prescribed procedures, and the weight of the nicotine in that material is determined.

The amounts of PM and nicotine (per filter pad, with each pad collecting the smoke of five cigarettes, as described later), being measured either absolutely or relatively, are miniscule. They are weight determined from each filter pad to the nearest 0.1 milligram.

A gram is about one twenty-eighth of an ounce. A milligram is one-thousandth of a gram. Put another way, a milligram is 1/28,000 of an ounce. The weighing of the filter pad, which collects PM from five machine-smoked cigarettes, to 0.1 milligram, is a determination to one ten-thousandth of a gram.

To visualize the quantities and the possible weight differences sought to be determined, one might consider a milligram to be equivalent to a barely visible particle of sugar which when dissolved in a quart of water—could not be tasted. A like comparison of a tenth of a milligram to an ounce would be to compare the apparent size of a period sign on a page of the Federal Register to the entire page.

What Is Not Being Measured?

The Ogg Method in fact does not, and cannot, measure either all of the particulate matter (PM), or the total nicotine, from any cigarette. It measures only the PM and nicotine in the volume of smoke puffed through a machine on the standardized method. It does not measure the PM or nicotine in all of the smoke that any cigarette might produce when totally smoked under any and all conditions.

The Ogg Method does not measure the volume of smoke—or the PM or nicotine in the volume of smoke—that any human being will draw from smoking any particular

cigarette. Each smoking characteristic is leveled or averaged out by the standard method.

No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion. The speed at which one smokes varies both among smokers, and usually also varies with the same individual under different circumstances even within the same day. Some take long puffs (or draws); some take short puffs. That variation affects the PM quantity in the smoke generated.

Even with the same type of cigarette, individual smokers take a different number of puffs per cigarette depending upon the circumstances. When concentrating, or talking, the number of puffs is usually less. When listening, or required to listen, to another person talking, the number of puffs per cigarette, as well as the duration of each puff, usually increases. Smoking rates while reading a book may differ from smoking rates while viewing a television program. The number of puffs and puff duration (as well as butt length) will vary according to emotional state. Some smokers customarily put their cigarette down in an ashtray where they burn between puffs; other smokers constantly hold cigarettes in their mouths; others hold them between their fingers.

As to butt length to which individuals smoke various types of cigarettes, as will be seen the average is over 30 millimeters, except where the filter prevents smoking down to that length, or where the rapidity of smoking generates a high heat zone or a change in taste, and causes the smoker to discard the cigarette. But, here again, there are no constants, and there is no relationship between standardized machine smoking of cigarettes and the volume of smoke which any smoker will get in smoking down to any selected butt length. About all that is known is that tobacco itself has some filter effect.

The Ogg Method does not and cannot measure these many variations in human smoking habits. It does not meas--

ure PM or nicotine in the smoke generated while the cigarette is not being puffed. It does not measure all of the PM or nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method.

These basic standardizations are well understood by all technologists in talking about any testing method.

Standardization Required And Embodied In The Ogg Method

Because of the minute quantities of PM present in smoke and the difficulties in impounding it on a filter pad and measuring these minute levels, the Ogg Method, or indeed any other scientific testing method, must attempt to reduce all possible variations that will substantially affect the determinations of PM and nicotine.

No standardization of technique can eliminate human error or ineptitude. No method designed can remedy the limitations in a testing method derived from the available equipment, the precision possible in its use, or its inability to secure reproducible results.

What the Ogg Method does standardize are a few of the factors—puff frequency, puff duration, and the puff volume through the filter pad—that affect the burning rate and the amount of PM and nicotine deposited.

Puff Frequency. One puff each 60 seconds, = one second is essential to the method. Two factors flow from that element of standardization. The first is that whatever smoking machine is used must precisely meet this basic time requirement. The second is a reminder that this puff frequency does not reflect widely varying smoking habits, and is an average.

Puff Duration. The puff is drawn for two seconds, again within a narrow tolerance of two-tenths of a second either way. If any results are to be accurate or remotely compara-

ble, this duration factor must be constantly watched, timed with accurate devices, and rigidly maintained by the machine.

Puff Volume. The Ogg Method standardizes this volume at 35 milliliters. Again, the permitted tolerance is = 0.5 milliliters. Obviously, puff volume is a basic controlling factor in the determination. There are various smoking machines that control puff volume, within the duration of each puff, in different ways. Once again, constant careful recalibration is essential. Once again, it must be remembered that the standardized puff volume may bear no direct relation to how any particular individual smokes, and is essentially an average.

The point to be remembered is that all of the difficulties and disclosed limitations in the Ogg Method exist even when these factors are carefully standardized. The Ogg Method of machine smoking was evolved on uniform specially prepared cigarettes. Its published description tells nothing about its use in the comparative testing of cigarettes of different brands which have varying construction, burning rate, and other variations. The Method as published discloses its variability, e.g., its limits of reproducibility, only on weight-selected cigarettes. (Compare Table 1 in the published Ogg Method.) It tells nothing about smoke volume or PM or nicotine in market-derived brands of cigarettes. For example, in smoking the same brand of conditioned cigarettes, under carefully controlled conditions with experienced technicians, the number of puffs in smoking a cigarette to a specified butt length can vary from seven to ten puffs in a single run of a machine.

How Does A Smoking Machine Collect PM And Nicotine?

For non-scientists to comprehend how a smoking machine works and the difficulties in any method employing smoking machines, there is no substitute for seeing smoking machines in operation in the hands of trained technicians. Nevertheless, the published Ogg Method indicates—and even

cursory viewing would confirm---a few of the key unavoidable operating problems. These can be easily visualized by a brief description of how the job must be done.

First, it is essential to equilibrate or condition the samples of each brand of cigarettes being tested because humidity conditions at the various pickup points vary so widely. The relative humidity encountered in New Orleans may be 90 percent, whereas in Phoenix it may be only 20 percent. In placing cigarettes on the conditioning screens, care must be exercised not to damage or fragment or spill tobacco from, the individual cigarettes.

Each filter pad is assembled in a plastic filter holder, the parts of which must be tightly screwed together, to be leak proof.

To one side there is next attached a piece of rubber membrane with a hole cut in it. This rubber membrane must be tightly locked on with a solid rubber ring.

Each assembled filter unit must then be separately tested for leaks.

Each filter assembly must next be conditioned in the correct humidity and temperature for a sufficient period.

Each unit assembly is then separately weighed and recorded to the nearest one-tenth of a milligram.

The assembled filter units are then placed in the smoking machine ports.

Some of the precise controls in placement and smoking may be indicated. The failure to exercise these will markedly affect the results.

To begin with, the smoking machine room must be precisely air conditioned for temperature and humidity control. Automatic controls for temperature and humidity must in turn be regularly verified with manual temperature and humidity checking devices.

The air flow in the machine, both at the top vents and at the smoking ports, must be checked each day with precise instruments because such air flow directly affects the burning rate of the cigarette between puffs and can materially affect the quantity of PM deposited. Absent proper venting, the machine and the room would accumulate smoke and distort the results.

Cardinally, the timing controls must be checked regularly, and on some type of machines even daily.

The entire machine assembly must be regularly checked to insure that it is leak proof throughout.

Even where the smoking machines are fully calibrated, the human factors in their operation are highly variable. When inserting the cigarette in the filter holder, the ends should not be bruised or broken. Where cigarettes are electrically ignited, the lighters should not be permitted to push the cigarettes against the filter pad. As Ogg notes, "Take care that butt end does not come in contact with [the Cambridge] filter disc."

Unless automatic cut-off devices are included in the smoking machine, the problem of watching and remembering "unders" and "overs" of butt length introduces large factors of human error. An operator has to watch, stop, and clear a number of ports within brief periods. Where automatic cut-offs are provided, carelessness in adjusting the burning threads or the springs can likewise affect the results.

For PM weighing and water and nicotine determination, other human manipulations are necessary which must be performed with both a high degree of skill and constant alert care.

The tare and second weighing of the filter unit must be performed with a chemical balance, preferably a refined, closed-chamber precision balance, within the same air-conditioned room.

In the removal of the filter pad from the smoking holder, the pad must be manually folded over with a large tweezer which is then used to rub all of the remaining PM from the holder onto the filter pad. Unless this pad folding and rubbing operation is performed carefully and completely, there may be marked variations in the latter determinations. Unless the manual wiping of the smoking holder is properly performed, as much as an entire milligram difference in the PM carried forward for the determinations can be here introduced by inexperience or ineptitude.

For water and nicotine determinations, each filter pad is next placed into a separate small flask which is then stoppered. These flasks must be carefully washed and oven dried after each use.

Thereafter each flask containing the separate filter pad must be thoroughly shaken with the precisely measured amount of solvent for up to an hour to get the water and nicotine into the solution. This must be accomplished by shaking machines or more rapidly by a spinning agitator.

Experience demonstrates that in the chromatographic determination of water variations can occur among different operators in the amount of solvent drawn and in the manner of its injection into these machines, which again requires constant calibration.

In nicotine determination, precise dilutions are necessary. In virtual mass production cigarette testing, that factor may readily become a source of human error.

The calculation of results requires the use of calculating machines and necessarily skilled operatives. Approximately two calculating machines are required in a laboratory utilizing about 40 ports.

These requirements of refined equipment and experienced personnel, and the basic limitations in the Ogg Method, underlie the necessity for the suggested period of

training for any personnel given the responsibility for operating a testing laboratory. Even Dr. Hammond found it necessary to offer that caution. (See Hammond Tr. 18-19.) They dictate further that adequate personnel must be provided.

Laboratory determinations of this nature cannot be speeded up to accommodate extraneously determined dates. At the outset, there must be at least one operator for each smoking machine, one for water determination, and two for nicotine determinations if these are to be kept in balance with the smoking machines. Additional personnel are required for calculation and recording, and for filter unit assembly and cleaning of laboratory flasks, and maintenance.

Limits Of Measurements Obtainable In Ogg Method

Even assuming adequate equipment and thoroughly experienced trained personnel, the available data makes clear the inherent limits in the Ogg Method. These can be talked about either as the limits of reproducibility of results within a single laboratory or as the variances in results found in the testing of identical cigarettes by the Ogg method among different laboratories.

These inescapable variances are in the Ogg Method itself, and have nothing to do with any variations in the population of cigarettes being tested. (That factor will be examined later.)

It can never be forgotten that the Ogg Method was evolved on a specially prepared uniform lot of cigarettes. Even so, the percentage coefficients of variance within single laboratories ranged between 1.2 percent and 5.9 percent. Between laboratories they were never lower than 9.8 percent. The mean standard deviation ranged as high as 3.19 milligrams PM for non-filter cigarettes and 2.48 milligrams PM for filtered cigarettes.

Industry testing of various brands of cigarettes, e.g., not a uniform specially prepared lot, has shown standard deviations as high as 2.8 milligrams per cigarette determined per port.

In short, even with the most accurate refined equipment and experienced personnel, the same laboratory cannot achieve reproducible results on all brands beyond these limits, and if the results of two laboratories are to be compared the spreads are greater. The significance of the variations in the method alone will be considered in discussing sample size and reporting.

Against this summary description of the machine smoking of cigarettes and what is involved in determining and reporting PM and nicotine, some additional comments may be offered on the four questions on which the Commission has invited comment.

Butt Length

Insofar as possible, the butt length to which cigarettes should be smoked in the smoking machine should be based on some rational criteria.

In any method employing machine smoking of cigarettes to determine PM and nicotine there must be standardization of puff frequency, puff duration, and buff volume. These basic factors nonetheless bear no relation to individual smoking by any human being. In that respect, as noted, these factors are when standardized initially averaged.

Because different people smoke to different butt lengths, and even the same individual will smoke to varying butt lengths depending upon the circumstances in which he is engaged, the use of an average butt length is the only rational basis to employ. To utilize predetermined average puff duration, puff volume, and puff frequency, and not to use an average butt length, creates both an illogical and unwarranted distortion in both the testing and reporting.

The recorded data makes it clear that the average butt length to which individuals smoke is somewhat in excess of 30 millimeters. No witness testified to an average of less than 30 millimeters.* Those who suggest a shorter butt length, and a different butt length for filtered cigarettes, are not unaware that doing so basically biases the comparative results under the Ogg Method largely in favor of filtered cigarettes.

It may be granted that there are presently no comprehensive studies of butt lengths, and indeed all such studies have inherent weaknesses. Butts obtained from ashtrays invariably indicate a lower average than the true length to which a cigarette is smoked because a great many smokers do not wholly extinguish cigarettes, and others exert varying degrees of pressure in attempting to extinguish them. Moreover, there is evidence that most smokers cannot smoke to less than 30 millimeters without burning their fingers. (See Hobbs Tr. 57)

If 23 millimeters were selected, 90 percent of the filter cigarettes cannot in fact be smoked to that length. Scientifically, it is not rational to adopt a standard butt length which is

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* Dr. Hammond testified that his study showed an average of "approximately 30" millimeters in the United States. (Tr. 33) Dr. Ogg testified that data available to members of the committee at the time of his study "indicated the average butt-length in this country at that time was approximately 30 millimeters," and that in a study Dr. Ogg had recently conducted "the averages came out for non-filter cigarettes was 30.2 millimeters and for filter cigarettes was 33.2." (Tr. 38-39.) Dr. Hobbs testified that a butt length of no shorter than 30 to 33 millimeters "does approximate average smoking habits." (Tr. 57.) See also the *Recommendations Submitted by Tennessee Eastman Company* stating that the results of its study "indicated that the average butt length was at least 30 mm." (p. 1) See also the various studies referred to on pages 5-6 of the *Statement to the Federal Trade Commission on Cigarette Smoking Techniques by the Celanese Corporation* all of which showed an average butt length of at least 30 millimeters.

not applicable to 90 percent of that group of cigarettes. About 99 percent of all cigarettes, both filtered and non-filtered, can be smoked to 30 millimeters.

Finally, there is no way of knowing what additional variances in the Ogg Method, which utilized a butt length of 30 millimeters, would be introduced by adopting a shorter butt length. In addition, any shorter butt length necessarily increases the difficulties for the operator in positioning the cigarettes in the smoking machine. This is a difficult and tedious task even for the most highly skilled operator having great dexterity. Moreover, the problems of terminating the machine smoking, either by observation and withdrawal, or by automatic means, make it clear that additional variances would be introduced. Reducing the butt length would require measurable increases in sample size.

Wet Or Dry Basis

Little need be added to this point. For most cigarettes, water content ranges from 6½ to 13 percent of PM collected on the Cambridge Filter. Water content among brands likewise varies even after conditioning. If the Commission is to test and record PM among brands, the failure to determine and report on a dry basis will be highly misleading.

Experience has demonstrated that test results on a dry basis contribute greater precision. As Dr. Ogg testified (Tr. 40) if the modern gas chromatographic method had been available at the time of his study, those methods would probably have been originally included to permit reporting on a dry basis.

Reporting Of Test Results

There is no challenge that results cannot be reported beyond the precision of the testing method. A spring bathroom scale, accurate only to a pound, cannot give a person's weight in ounces or fractions of an ounce.

As to particulate matter, the errors in the Ogg procedures permit accuracy only to the nearest milligram and not to any more finite values. What has already been noted with respect to the variances in the Ogg Method and the possibilities of human error in the mass testing of cigarettes makes it abundantly clear that any effort to report comparable PM results among different brands of cigarettes to less than the nearest whole milligram would be both unfounded and substantially misleading.

By the same token, the record makes clear that the failure to report results both on an average per puff and average per cigarette basis would create bias and have unwarranted adverse competitive effects.

Sampling Procedures and Number of Cigarettes To Be Smoked

There is no need for elaborate additional statistical analysis for the consideration of sample size.

To begin with it may be assumed that picking up samples of each brand at 50 market points will permit the market sample to approach a true probability sample—to which conventional statistical formulas may be applied. Such a market sample will not be a true probability sample, but for practical purposes, considering the other variances which must be dealt with, it may be considered sufficiently randomized to be utilized as though it were a true probability sample.

Next, there appears to be no disagreement that a confidence level of 95 percent will afford a reasonable criterion.

The determination of the number of cigarettes of each brand to be smoked to afford a pragmatically acceptable estimate for the entire population of a particular brand therefore turns on conventional statistical formulas that will adequately reflect the variations both in the method and in the cigarettes. The most conservative figure advanced, developed from reported industry experience, employs a standard deviation of

1.6 milligrams and yields a required sample size to be smoked of 205 cigarettes.

Statistical experts, invited carefully to study the data and make recommendations to the Commission, were in accord in advising that this suggested sample size would have to be regarded as the absolute minimum. As Dr. Herbert Arkin (an outstanding authority as indicated by his qualifications) pointed out, the variations in cigarettes within the same brand as well as the variations inherent in the Ogg Method makes it clear that the use of a standard deviation of 1.6 milligrams tends to understate the required sample size. His recommendation is that the highest reported standard deviation, rather than a value nearer the lowest, found in previous testing work, should be used, to avoid sampling and other errors. (Arkin Letter, pages 4-6.) He also notes that in most of the previous testing, cigarettes were weight selected rather than tested as they are found on the market and smoked by consumers, a factor that reduces the standard deviation, and therefore should be considered. In his judgment, therefore, a much larger sample would be appropriate, certainly at the outset and until a standard deviation for each brand has been determined.

On the basis of his conclusion that a sample size, determined by employing a standard deviation of 2.2 to 2.6 milligrams would be appropriate, a sample size of 307 to 519 cigarettes to be smoked would be required. (See Arkin Letter, pages 4-5, Appendix A.)

Mr. Hendricks, speaking for both himself and Dr. Alva L. Finkner, of the Research Triangle Institute, emphasized that in the application of conventional statistical formulas to the current problem, the fact that the percentage differences in PM and nicotine may lie within very narrow limits, to achieve the desired precision in reporting test results would call for about 350 cigarettes of each brand to be tested. This would be essential where these percentage differences be-

tween brands were 25 percent of the comparative PM values being reported. (Hendricks Statement, pages 12-14.)

Moreover, utilizing the published Reader's Digest comparative PM and nicotine values for a number of different market brands, he found that the percentage of difference was very small indeed and that if in the brands tested by the Commission comparable small percentages of differences turned up, far larger samples would be required to be tested. (Hendricks Statement, page 14.)

No valid basis was offered at the hearing for reducing the sample size to be tested below the absolute minimum level of 205 advanced by the research scientists of the five cigarette companies.

The suggestion that sample size or butt length can somehow be related to a small fraction of the population of smokers is about as valid as suggesting that average weight estimates can be developed by limiting the observations to the skinniest people in the population and drawing a small enough sample to eliminate the contributions to the average made by the heavier or even obese people.

The only remaining point of apparent confusion resides in the failure to understand that (in addition to the disclosed variations inherent in the use of the Ogg Method by thoroughly experienced tobacco technologists) there are inescapable natural variations in cigarettes. Despite recognized close quality control in their manufacture, the tobacco in cigarettes is a natural product, cigarettes are mass produced on fast machinery, and they are distributed under highly varying climatic conditions and periods of storage. In addition, the required handling in conditioning prior to testing, and in the testing procedure itself, occasions further variations. The plain fact is that in the standardized machine smoking of the same brand of cigarettes, randomly selected from a market purchase, the rate of burning causes a difference in the number of puffs ranging from seven to ten puffs per cigarette.

This in turn causes variations in the PM and nicotine deposited on the filter, and results more from the variations among cigarettes than from the limits of the method.

In short, any suggestion that every cigarette is precisely and minutely identical to every other cigarette within the same brand is fallacious. No processed natural product can be manufactured to such precise limits. Recognition of the variation in any processed agricultural product is reflected in every governmental or commercially developed grading standard.

It is perhaps unnecessary to repeat that no factual scientific data exists as to the relevance of PM or so-called "tar" or nicotine content in terms of health.

Respectfully submitted,

THE AMERICAN TOBACCO COMPANY
/S/ CYRIL F. HETSKO

BROWN & WILLIAMSON TOBACCO CORPORATION
/S/ ADDISON YEAMAN

LIGGETT & MEYERS TOBACCO COMPANY
/S/ FREDERICK P. HAAS

PHILIP MORRIS INCORPORATED
/S/ PAUL D. SMITH

R. J. REYNOLDS TOBACCO COMPANY
/S/ H. HENRY RAMM

December 20, 1966

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FEDERAL TRADE COMMISSION

CIGARETTES

Testing for Tar and Nicotine Content

The Federal Trade Commission, having been advised by the staff that the cigarette testing laboratory has satisfactorily completed its trial tests, hereby issues directions to its staff to commence the first formal test, under the following conditions:

1. Smoke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 33 mm.

2. Base result on a test of 100 cigarettes per brand, or type.

3. Cigarettes to be treated will be selected on a random basis, as opposed to "weight selection".

4. Determine particulate matter on a "dry" basis employment the gas chromatography method published by C.M. Sloan and B.J. Sublett in Tobacco Science 9, page 70, 1965, as modified by F.J. Schultz' and A.W. Spears' report published in Tobacco Vol. 102, No. 24, page 32, dated June 17, 1965, to determine the moisture content.

5. Determine and report the "tar" content after subtracting moisture and alkaloids (as nicotine) from particulate matter.

6. Report tar content to the nearest whole milligram and nicotine content to the nearest 1/10 milligrams.

The Commission directs that the test cover approximately 50 of the major brands and types (many brands are sold as regular, and king size, or filter, etc.) and all brands for which any tar or nicotine statement appears on the label or in the advertising. With respect to the latter, one purpose of the test will be to determine the accuracy of such statement. Cigarettes for testing will be purchased on the open market in 50 localities throughout the United States.

Issued: July 31, 1967

By the Commission.

JOSEPH W. SHEA,
Secretary.

* * *

Federal Trade Commission

TAR, NICOTINE, AND CARBON MONOXIDE OF THE SMOKE OF 1206 VARIETIES OF DOMESTIC CIGARETTES FOR THE YEAR 1994

1997

Report of "Tar," Nicotine, and Carbon Monoxide of the Smoke of 1206 Varieties of Domestic Cigarettes For the Year 1994

This report contains data on the "tar," nicotine, and carbon monoxide yields of 1206 varieties of cigarettes manufactured and sold in the United States in 1994. The Federal Trade Commission (FTC) obtained the test results from the five largest cigarette manufacturers in the United States. These companies are: Brown & Williamson Tobacco Corporation; Liggett Group, Inc.; Lorillard, Inc.; Philip Morris, Inc.; and R.J. Reynolds Tobacco Company, Inc.[1]

The Tobacco Institute Testing Laboratory (TITL), a private laboratory operated by the cigarette industry, conducted most the "tar," nicotine, and carbon monoxide tests for these varieties. The Commission collected the results of the TITL testing directly from the individual companies under compulsory process. Generic, private label, and other brands not widely available were not tested by TITL. The Commission obtained the information on these other brands directly from

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[1] The number of major domestic cigarette manufacturers went from six to five in April 1995, when the Commission approved B.A.T. Industries' acquisition of The American Tobacco Company after B.A.T., the parent company of Brown & Williamson, agreed to divest itself of certain assets it proposed to acquire from American Tobacco. In October 1996, the Commission approved B.A.T.'s application to divest six brands, a manufacturing plant, and certain related assets to Commonwealth Tobacco LLC.

the manufacturers, pursuant to compulsory process. Results of such non-TITL testing are indicated by asterisks. The methodology, processes, and procedures that the five cigarette companies and TITL employ are identical to those the Commission, in its own testing lab, had followed in the past.[2] Harold Pillsbury, the former director of the FTC laboratory and currently a contractor to the Commission had unrestricted access to the TITL laboratory to review TITL's testing methodology and protocols and to monitor the actual testing process. TITL provided the results to the respective cigarette companies, which then provided TITL's data regarding their own brands to the FTC in response to compulsory process.

The cigarettes were tested using the Cambridge Method. The FTC approved this methodology, and it has been the standard for cigarette testing since 1966. The testing was subjected to the conditions prescribed by the FTC in Federal Register, Volume 32, Number 147, Page 11,178, dated August 1, 1967. With regard to the testing of carbon monoxide yield, the conditions are specified in Federal Register, Volume 45, Number 134, Page 46,483, dated July 10, 1980. The conditions prescribed in the FTC's 1967 announcement are the following:

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[2] The Commission determined in early 1987 to close its laboratory. The Commission found that closing the laboratory was necessary for several reasons, chiefly, the cost of the laboratory was significant, and the Commission would have had to commit significant additional funds to continue the program. The Commission was also persuaded that the information could be obtained from other sources, and other means were available to verify the accuracy of industry testing results.

1. Smoke cigarettes to a 23mm. butt length, or to the length of the filter and overwrap plus 3mm. if in excess of 23mm.;
2. Base results on a test of 100 cigarettes per brand, or type;
3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection";
4. Determine particulate matter on a "dry" basis employing the gas chromatography method published by C.H. Sloan and B.J. Sublett in Tobacco Science 9, page 70, 1965, as modified by F.J. Schultz' and A.W Spears' report published in Tobacco Vol. 162, No. 24, page 32, dated June 17, 1966, to determine the moisture content;
5. Determine and report the "tar" yield after subtracting moisture and alkaloids (as nicotine) from particulate matter;
6. Report "tar" yield to the nearest whole milligram and nicotine yield to the nearest 1/10 milligram (32 Fed. Reg. 11,178 (1967)).

The 1980 FTC announcement contained specifications regarding a new testing methodology to determine the carbon monoxide (CO) and nicotine yield of cigarettes. These specifications are the following:

1. Determine CO concentration using a 20-port sequential smoking machine described by H.C. Pillsbury and G. Merfeld at the 32nd Tobacco Chemists Research Conference, October 1978;
2. The concentration of CO will be reported as milligrams per cigarette;
3. The present method for "tar" and nicotine determination will be modified to use the method described in an article entitled, "Gas Chromatographic Deter-

mination of Nicotine Contained on Cambridge Filter Pads," by John R. Wagner et al., as presented at the annual meeting of the Association of Official Analytical Chemists, October 1978 (45 Fed. Reg. 46,483 (1980)).

NEWS RELEASE

FEDERAL TRADE COMMISSION

Washington, D.C. 20580

OFFICE OF INFORMATION *393-6800 Ext. 197*

For RELEASE: A.M., Tuesday, August 1, 1967

FTC TO BEGIN CIGARETTE TESTING

The Federal Trade Commission, having been advised by the staff that the cigarette testing laboratory has satisfactorily completed its trial tests, has now issued directions to commence the first formal test, under the following conditions:

1. Smoke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 23 mm.,

2. Base results on a test of 100 cigarettes per brand, or type,

3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection,"

4. Determine particulate matter on a "dry" basis employing the gas chromatography method published by C.H. Sloan and B.J. Sublett in Tobacco Science 9, page 70, 1965, as modified by F.J. Schultz' and A.W. Spears' report published in Tobacco Vol. 162, No. 24, page 32, dated June 17, 1966, to determine the moisture content,

5. Determine and report the "tar" content after subtracting moisture and alkaloids (as nicotine) from particulate matter,

6. Report tar content to the nearest whole milligram and nicotine content to the nearest 1/10 milligrams.

The Commission directed that the test cover approximately 50 of the major brands and types (many brands are sold as regular, and king size, or filter, etc.) and all brands for which any tar or nicotine statement appears on the label or in the advertising. With respect to the latter, one purpose of the test will be to determine the accuracy of such statement. Cigarettes for testing will be purchased on the open market in 50 localities throughout the United States.

In determining the foregoing procedures, the Commission relied substantially upon a record including written presentation by interested persons and oral testimony offered at a public hearing on November 30, 1966, which was held "to assist the Commission in determining what action, if any, should be taken in the public interest with respect to modifying or amplifying the Cambridge Filter Method . . . and the form in which test results should be expressed." At the hearing the Commission received numerous submissions reflecting a variety of modifications of the Cambridge Filter Methods that have been adopted by different groups engaged in testing cigarettes. No test can precisely duplicate conditions of actual human smoking and, within fairly wide limits, no one method can be said to be either "right" or "wrong." The Commission considers it most important that the test results be based on a reasonable standardized method and that they be capable of being presented to the public in a manner that is readily understandable. Although minor variations may not make one testing method "better" than another, the public interest requires that all test results presented to the public be based on a uniform method used by all laboratories. Use of more than one testing method would produce different results which would only serve to confuse or mislead the public.

In determining the testing method, the Commission has not attempted to gauge the test to the amount of smoke, or tar

and nicotine, which the "average" smoker will draw from any particular cigarette.

No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion. The speed at which one smokes varies both among smokers, and usually also varies with the same individual under different circumstances even within the same day. Some take long puffs (or draws); some take short puffs. That variation effects the tar and nicotine quantity in the smoke generated.

Even with the same type of cigarette, individual smokers take a different number of puffs per cigarette depending upon the circumstances. When concentrating, or talking, the number of puffs is usually less. When listening, or required to listen to another person talking, the number of puffs per cigarette, as well as the duration of each puff, usually increases. Smoking rates while reading a book may differ from smoking rates while viewing a television program. The number of puffs and puff duration (as well as butt length) will vary according to emotional state. Some smokers customarily put their cigarettes down in an ashtray where they burn between puffs; other smokers constantly hold cigarettes in their mouths; others hold them between their fingers.

The Cambridge Filter Method does not and cannot measure these many variations in human smoking habits. It does not measure tar or nicotine in the smoke generated while the cigarette is not being puffed. It does not measure all of the tar and nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method. Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method.

Accordingly, the testing method should not be considered defective because it does not rely on "averages." There

are too many variables as to both smokers and smoking conditions for any average to be meaningful. Test results phrased in terms of an "average" smoker could be misleading to the public, because a smoker has no way of knowing how closely his smoking habits conform to those of the purportedly "average" smoker. It should be emphasized that the Cambridge Filter Method itself did not purport to duplicate an "average" smoker. Rather, it was an amalgam of many choices—some of them arbitrary. For example, the temperature and humidity specified in that method was not determined by reference to the "average" temperature or the "average" humidity at which people smoke cigarettes. There is no human smoker who smokes, and no cigarette that is smoked, under conditions that precisely duplicate either the Cambridge Filter Method in its original form or as modified by the Commission. Thus, to reiterate, the uniform method determined by the Commission has as its purpose measurement of the tar and nicotine generated by cigarettes when smoked according to that procedure.

There has been a wide variation among testing groups on the question of how many cigarettes of each brand to test. Recommendations were made to the Commission to test as few as 60 cigarettes per brand and as many as 200. After studying the record and its laboratory's preliminary test results, the Commission has determined that testing 100 cigarettes per brand will provide valid and reliable results. However, the Commission intends to continue evaluating its test results, and on that basis may determine in the future to change the number of cigarettes tested or any other testing procedures as may be found necessary.

Chairman Dixon dissents from that part of the majority's direction on testing procedures with respect to butt length and has filed a separate statement which is attached.

Commissioner MacIntyre did not participate in the Commission's vote on this matter for the reason that he did not consider that the Commission's cigarette testing labora-

tory had satisfactorily completed its trial test so as to sufficiently and adequately advise the Commission regarding what is required in this respect.

Attached is: Separate Statement of Chairman Dixon.

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

JOSEPH W. SHEA
Secretary

October 25, 1967

Mr. Howard H. Bell, Director,
The Code Authority,
National Association of Broadcasters,
1771 N Street, N.W.,
Washington, D.C. 20036

Dear Mr. Bell:

This will reply to your letter of September 20, 1967, in which you inquire as to the Commission's current policy regarding (1) statements in cigarette advertising relating to health implications of tar and nicotine content of cigarettes, and (2) utilization in advertising of the official FTC tar and nicotine yield data. Your letter requests any guidance that the Commission could provide your organization in administering Radio and Television Code policies pertaining to cigarette advertising.

Any discussion of this subject at the present time must begin with the premise, which is correctly stated in your letter, that "the government would like to stress the relative advantages of low tar and nicotine yield cigarettes". In the Report to Congress on Smoking and Health, submitted on July 12, 1967, the Secretary of Health, Education, and Welfare stated that "the accumulated evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the lower the harmful effect. * * * The cigarette package label and advertising should be required to contain information on the 'tar' and nicotine levels in the smoke of the cigarette, and the identity and quantity of such other substances or agents in the smoke as may subsequently be found by the appropriate Federal agency to contribute to the health hazards of smoking."

To the same effect, the Surgeon General of the U.S. Public Health Service testified before the Senate Commerce Committee on August 25, 1967, as follows:

> "I believe that disclosure of tar and nicotine on cigarette packages and in advertisements, and the responsible promotion of those cigarettes low in tar and nicotine would be constructive and helpful steps to the extent they provide the smoker with as much information as possible on the risks of smoking and enables him to make his own decision as to the amount of dosage he will accept. Public opinion backs such action. A Public Health Service survey shows that 77 percent of people who were interviewed felt that cigarette companies should be required to list tar and nicotine content on packages; among cigarette smokers, 71 percent favored such action. As other substances are found in the cigarette smoke which contribute to the health hazard of smoking, the identity and quantity of such substances, should be included along with tar and nicotine in the package labeling and in advertising.
>
> "The question is: will tar and nicotine disclosure on cigarette packages and in advertisements encourage wider use of the brands with lower levels? I believe that a progressive reduction of tar and nicotine levels will result from such action because of public demand."

In its Report to Congress under the Federal Cigarette Labeling and Advertising Act, transmitted June 30, 1967, the Federal Trade Commission stated: "For the information of cigarette smokers, the Commission favors mandatory labeling of tar and nicotine content on cigarette packages and in cigarette advertisements and other measures that will prompt

cigarette manufacturers to develop less hazardous cigarettes. * * * It appears to the Commission, from the switch toward filter cigarettes and the popularity of low tar and nicotine cigarettes, that a substantial segment of the public is most concerned about the health hazards of cigarette smoking. Many smokers would like to give up the habit, but don't and won't. Some of these have switched to brands that they believe, often erroneously, to be less hazardous. The Commission favors giving smokers as much information about the risks involved in smoking as is possible and to that end favors mandatory disclosure of tar and nicotine content, as measured by a standard test." (Pp. 8, 28.)

After review and reexamination in the light of the foregoing, the Commission's current enforcement policy in regard to statements of, and representations relating to, tar and nicotine content of cigarettes may be formulated as follows: As a general rule, the Commission will not challenge such statements or representations where they are shown to be accurate and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the Federal Trade Commission, as described in its release issued August 1, 1967. Advertisements which correctly report official FTC tar and nicotine yield data are within this category. On the other hand, statements or representations based on non-standardized tests having no official or governmental sanction would tend to confuse and mislead the public.

Where comparisons of tar and nicotine content with other brands of cigarettes are made, the advertising should be factual, fair, and not misleading. For example, a cigarette testing relatively high or not among the lowest in tar and nicotine yield should not be represented to be otherwise, either expressly or by innuendo. By the same token, a cigarette testing relatively low, or among the lowest, in comparison with other brands may be so represented in advertising it to the public, provided that the basis for comparison is fully and

fairly stated. It must also be borne in mind that, while presently available scientific data indicate that a substantial reduction of tar and nicotine intake may lower the harmful effects, there is no reliable evidence that the health hazards of cigarette smoking are thereby eliminated or avoided. Hence, no matter how relatively low its tar and nicotine content, no cigarette may truthfully be advertised or represented to the public, expressly or by implication, as "safe" or "safer".

The Commission recognizes that this statement of enforcement policy is necessarily cast in general terms, and that questions will inevitably arise concerning its application to particular cases. In facilitating the resolution of such problems, the Commission's advisory opinion procedure will be available to you and to members of the broadcasting and cigarette industries.

In view of the substantial public interest of the subject matter, the Commission is making public this exchange of correspondence.

By direction of the Commission.

Chairman Dixon and Commissioner MacIntyre dissented. Their separate statement is attached. Also attached is the separate statement of Commissioner Elman.

/s/ JOSEPH W. SHEA,

Joseph W. Shea
Secretary.

SEPARATE STATEMENT OF CHAIRMAN DIXON AND COMMISSIONER MacINTYRE

In response to the inquiry from the National Association Broadcasters, the Commission has set forth its current enforcement policy in regard to statements of, and representations relating to, tar and nicotine content of cigarettes. In substance, the policy statement is to the effect that the Commission will not challenge representations as to tar and nicotine content of cigarettes when the representations are substantiated by tests conducted in accordance with testing methods used by the Commission. Moreover, the policy statement asserts that representations based on tests not performed in accordance with the methods set down by the Commission would tend to confuse and mislead the public. Thus, by implication, it is the stated policy of the Commission to challenge such representations.

Prior to the establishment of testing procedures by the Commission, various manufacturers had made representations as to tar and nicotine content of their individual cigarettes, based on the Cambridge Filter Method of testing, which tested cigarettes to a 30 mm. butt length. The Commission, however, in establishing its testing procedures, did not adopt the 30 mm. butt length of the Cambridge method but set 23 mm. as the standard for testing. This is the shortest butt length to which a cigarette can be tested in the Commission's testing machine. All that will be shown as the result of this standard is the maximum amount of tar and nicotine that a smoker may inhale.

Certainly, we would agree to the use of the 23 mm. butt length for testing purposes if it were established that this is the average length to which all smokers smoke their cigarettes. Unfortunately, however, this is far from being the fact. In the first place, it is physically impossible to smoke most filter brands of cigarettes to a 23 mm. butt length. As has been pointed out in a previous statement on this issue, of approximately 120 brands of cigarettes on the market, only

49 can be smoked to 23 mm. Secondly, it is agreed that because smoking habits vary greatly, smokers of nonfilter as well as filter brands smoke their cigarettes to varying butt lengths, either shorter or longer than a 23 mm. butt length.

It is generally agreed that the shorter the butt length of a cigarette, the more tar and nicotine are generated in the mainstream smoke of the cigarette. In other words, the yield of tar and nicotine is not uniform for the entire length of the cigarette. Thus, the mainstream smoke of a cigarette at, for example, a 23 mm. butt length will yield more tar and nicotine than the mainstream smoke at 30 mm. Tests performed to a 23 mm. butt length, while giving the maximum tar and nicotine content, will not be a true indication as to the tar and nicotine content of the same cigarette at 30 mm.

It is our belief that one of the purposes in establishing cigarette testing procedures was to afford smokers a meaningful way of comparing the amount of tar and nicotine yields as between brands. Under the foregoing circumstances, we do not see how the Commission's standards will accomplish this purpose. In our view, it is misleading to require that tests be performed to a butt length which gives a maximum yield of tar and nicotine in nonfilter cigarettes when, in fact, it has not been established that this is an average butt length for smokers, and it is not possible to smoke certain filter brands to that butt length.

We would not challenge representations based on tests performed to a 30 mm. butt length. Since most brands of cigarettes can be tested to that length, the smoker would have a meaningful way of comparing tar and nicotine content regardless of the overall length of the cigarettes. We realize, of course, that there are possibly five brands of cigarettes which cannot be smoked even to 30 mm However, the 30 mm. standard would serve to minimize the disadvantages inherent in the 23 mm. standard which, in effect, precludes a meaningful comparison between a majority of the brands now on the market.

SEPARATE STATEMENT OF COMMISSIONER ELMAN

It is true, as Chairman Dixon points out, that the Commission's tests will show the maximum amount of tar and nicotine that a smoker of a particular brand will inhale. It is also true, as he notes, that brands of cigarettes on the market vary in length. Thus, if Brand A is 100 mm. long and Brand B, made of the same tobacco, is 85 mm. long, the tests will show Brand A as containing more tar and nicotine than Brand B. According to Chairman Dixon, this is "misleading". I do not agree.

Suppose, for example, that one were to test the caloric content of chocolate bars. Brand A is sold in a 4 oz. size, and Brand B, made of the same ingredients, is sold in a 3 oz. size. One who eats a Brand A bar will consume substantially more calories than Brand B. Is it "misleading" to report that Brand A contains more calories than Brand B? Chairman Dixon would answer "yes", because it is "not established" that the "average person" will eat the whole bar. Conceivably, he might eat only half of a Brand A bar—in which case he would be consuming fewer calories than if he ate all of Brand B. The Chairman applies the same reasoning to the testing of cigarette brands for tar and nicotine content.

Moreover, even he does not propose that the testing procedure should be to smoke a uniform length (say, 50 mm.) of every cigarette regardless of its actual size. His proposal was, and is, that all cigarettes, regardless of size, be smoked down to a butt length of 30 mm. Thus, if the Chairman's testing procedure were to be used, the machine would smoke 70 mm. of Brand A, 100 mm. long, and 55 mm. of Brand B, made with the same tobacco but 85 mm. long. The Chairman's test results would be just as "misleading" in showing Brand A as containing more tar and nicotine than Brand B.

The Chairman also points out that many filter brands cannot be smoked down to a butt length of 23 mm. Taking

that fact into account, the Commission's testing procedure provides that all such cigarettes shall be tested to a butt length of "the filter and overwrap plus 3 mm." In this respect the Commission adopted the proposal made not only by the health and medical organizations but also by industry representatives. This testing procedure clearly affords a sensible and meaningful basis for comparing the maximum tar and nicotine yields as between brands of cigarettes; and it is neither accurate nor fair to suggest otherwise.

The fact of the matter is that there is nothing "misleading" in the testing procedure adopted by the Commission. The difference between the Chairman and the majority of the Commission is quite simple. He would test a cigarette for only part of its tar and nicotine content. We would test for all of it. By analogy, the Chairman would determine the alcohol content of a martini by testing the vermouth but not the gin. Query: who is "misleading" whom?*/

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*/ Since the Chairman has seen fit to rehash the arguments considered and rejected by the Commission before adopting its testing procedure, it is appropriate to repeat the following excerpts from the Commission's release of August 1, 1967:

> "No test can precisely duplicate conditions of actual human smoking and, within fairly wide limits, no one method can be said to be either 'right' or 'wrong.' The Commission considers it most important that the test results be based on a reasonable standardized method and that they be capable of being presented to the public in a manner that is readily understandable. Although minor variations may not make one testing method 'better' than another, the public interest requires that all test results presented to the public be based on a uniform method used by all laboratories. Use of more than one testing method would produce different results which would only serve to confuse or mislead the public.
>
> "In determining the testing method, the Commission has not attempted to gauge the test to the amount of smoke, or tar and nicotine, which the 'average' smoker will draw from any particular cigarette.

[Footnote continued on next page]

[Footnote continued from previous page]

"No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion. The speed at which one smokes varies both among smokers, and usually also varies with the same individual under different circumstances even within the same day. Some take long puffs (or draws); some take short puffs. That variation affects the tar and nicotine quantity in the smoke generated.

"Even with the same type of cigarette, individual smokers take a different number of puffs per cigarette depending upon the circumstances. When concentrating, or talking, the number of puffs is usually less. When listening, or required to listen to another person talking, the number of puffs per cigarette, as well as the duration of each puff, usually increases. Smoking rates while reading a book may differ from smoking rates while viewing a television program. The number of puffs and puff duration (as well as butt length) will vary according to emotional state. Some smokers customarily put their cigarettes down in an ashtray where they burn between puffs; other smokers constantly hold cigarettes in their mouths; others hold them between their fingers.

"The Cambridge Filter Method does not and cannot measure these many variations in human smoking habits. It does not measure tar or nicotine in the smoke generated while the cigarette is not being puffed. It does not measure all of the tar and nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method. Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method.

"Accordingly, the testing method should not be considered defective because it does not rely on 'averages.' There are too many variables as to both smokers and smoking conditions for any average to be meaningful. Test results phrased in terms of an 'average' smoker could be misleading to the public, because a smoker has no way of knowing how closely his smoking habits conform to those of the purportedly 'average' smoker."

Smoking and Tobacco Control

Monograph 7

The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes

Report of the NCI Expert Committee

NATIONAL INSTITUTES OF HEALTH
National Cancer Institute

Foreword

In response to the emerging scientific evidence that cigarette smoking posed a significant health risk to the user, in the early 1950's the major cigarette manufacturers began widespread promotion of filtered cigarettes to reassure smokers that, regardless of whatever unhealthy constituents were in cigarette smoke, filters were a "scientific" breakthrough.

Advertisements for Viceroy's "health guard filter" stated, "DENTISTS ADVISE—Smoke VICEROYS—The Nicotine and Tars Trapped by The Viceroy Filter CAN NEVER STAIN YOUR TEETH!" and "Leading N.Y. Doctor Tells His Patients What to Smoke—Filtered Cigarette Smoke Is Better For Health. The Nicotine and Tars Trapped . . . Cannot Reach Mouth, Throat Or Lungs." Chesterfield was "Best for you—*low* in nicotine, highest in quality," while L&M's were "Just What the Doctor Ordered." Lorillard Tobacco Company stressed its science-based Kent micronite filter (the original micronite filter was made of asbestos) and claimed it removed seven times more tar and nicotine than any other cigarette, which "put Kent in a class all by itself where health protection is concerned." Of course, we know today that not only were these claims patently false, but the cigarette companies knew it.

In the early 1950's the Federal Trade Commission (FTC) challenged a variety of health claims made for cigarettes in their advertising, including claims about tar and nicotine. In

1955 FTC published advertising guidelines that, among other things, prohibited claims by cigarette manufacturers that a particular brand of cigarettes was low in tar and nicotine or lower than other brands, when it had not been established by competent scientific proof that the claim was true and the difference was significant. Cigarette manufactures, however, continued to advertise tar numbers. In the absence of a standardized test methodology, this resulted in what is referred to as a "tar derby"—a multitude of inconsistent, noncomparable claims that did not give consumers a meaningful opportunity to assess the relative tar delivery of competing brands. The tar derby ended in 1960 when discussions with FTC culminated in an industry agreement to refrain from tar and nicotine advertising.

In 1966, however, the U.S. Public Health Service (PHS) prepared a technical report on "tar" and nicotine that concluded, "The preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful would be the effect." In reaching this conclusion, the report noted the clear relationship between dose of cigarette smoke received by the smoker and disease risk. Regardless of how dose was calculated—by number of cigarettes smoked per day, age of initiation, total number of years one smoked, or depth of inhalation, mortality rates among smokers increased. When smokers quit smoking, their risk was reduced in proportion to the length of time off cigarettes.

Subsequent to the PHS statement, FTC reversed its decision banning tar and nicotine claims in advertising and established a standardized testing protocol for assessing tar and nicotine yields. Today that protocol is widely known as the FTC test method. In 1980 the protocol was broadened to include measurement of the carbon monoxide yields of cigarettes as well.

The initial protocol adopted by FTC was largely based on the work of U.S. Department of Agriculture chemist C.L.

Ogg, as published in the *Journal of the Association of Official Agricultural Chemists* in 1964. It appears, however, that this protocol was based on one person's observations about how people smoked.

Much the same protocol had been proposed by American Tobacco Company researchers in 1936. Writing in the July Issue of *Industrial and Engineering Chemistry*, J.A. Bradford and colleagues noted, "The present writer's arbitrarily selected rate is a 35-cc puff of 2-second duration taken once a minute."

However, cigarettes consumed at that time were vastly different from those manufactured and marketed later. In fact, tar and nicotine levels began to decline during the 1950's, concurrent with the mass marketing of filter cigarettes. Market share of filter cigarettes increased from almost zero in 1950 (0.6 percent of the market) to 50 percent by decade's end. Total cigarette sales, which had begun to decline after the first public statements about the hazards of smoking in the early 1950's, rebounded to new highs.

Although filter efficiency may have contributed to some of the reduction in tar/nicotine yields in the 1950's, the decline resulted mostly from less tobacco being used to make filtered as opposed to unfiltered cigarettes. However, during the 1960's and 1970's major cigarette design changes resulted in significantly lower machine-measured cigarette yields. The changes included increased use of ventilated tobacco rods and filters, use of more porous cigarette papers, and increased use of expanded and reconstituted tobacco. Concurrent with these modifications in cigarette design, cigarette manufacturers increasingly made use of additives in manufacturing. Today about 600 different compounds are routinely added to domestic cigarette brands, yet no routine testing is performed to determine whether these compounds pose any additional health risk to the smoker when they are burned in a cigarette.

U.S. market share of cigarettes yielding 15 mg tar or less went from 3.6 percent in 1970 to 44.8 percent by 1980. The sales-weighted average tar and nicotine yields of all U.S. cigarettes are now approximately 12 mg tar and 0.9 mg nicotine. By comparison, sales-weighted yields in the early 1950's were 35 mg tar and 2.5 mg nicotine.

As consumption of low-yield cigarettes began to proliferate, the public health community became concerned that these products were not what they seemed. Increasingly, scientific studies documented that smokers who switched to these low-yield products smoked them differently, thus negating the reason many of them changed in the first place—to lower their health risk.

The U.S. Congress also voiced its concern in 1978 when it enacted the Health Services and Centers Act. Section 403 of that legislation directed the U.S. Department of Health and Human Services (DHHS) to conduct a "study or studies of (1) the relative health risks associated with smoking cigarettes of varying levels of tar, nicotine, and carbon monoxide; and (2) the health risks associated with smoking cigarettes containing any substances commonly added to commercially manufactured cigarettes." The Secretary of the Department of Health and Human Services addressed this issue as part of the 1981 Surgeon General's report, *The Health Consequences of Smoking: The Changing Cigarette*. The overall conclusion of that report was clear: There is no safe cigarette and no safe level of consumption." Although the report did note that smoking cigarettes with lower yields of tar and nicotine reduces the risk of lung cancer to some extent, the benefits are minimal in comparison with giving up cigarettes entirely. Evidence relating to heart disease, other cancers, or chronic obstructive lung disease was not sufficient to permit conclusions to be drawn. As to the accuracy of the FTC test method, the report stated: "The 'tar' and nicotine yields obtained by present testing methods do not correspond to the

dosages that the individual smokers receive: In some cases they may seriously underestimate these dosages."

Growing numbers of questions were raised about the accuracy of the FTC test protocol to measure tar, nicotine, and carbon monoxide levels from low-yield cigarettes—questions raised not just by the public health community but also within the tobacco industry. Competitors complained to FTC that Brown and Williamson's (B&W) Barclay brand cigarette did not test accurately with the FTC test method. They argued that the brand was designed with unique air ventilation channels that caused it to test low on the FTC method. The ventilation channels, which remained open when Barclays were smoked on the FTC machine, were rendered inoperable when a human being smoked the cigarettes. In April 1983 FTC announced that its testing method understated values for constituents in Barclay cigarettes, and as a result, until new testing methods were developed, FTC would no longer report an official rating for Barclay cigarettes. Later, FTC took similar steps with respect to other B&W cigarette varieties that used a filter design similar to Barclay's.

Eventually FTC closed its cigarette testing laboratory, in part because of insufficient expertise within the agency to carry out an increasingly complex and costly testing program. Since 1987, constituent levels for domestic cigarette brands have been determined for the manufacturers by the Tobacco Institute Testing Laboratory with oversight by FTC. The Tobacco Institute serves as a trade organization as well as the information and lobbying arm of the tobacco industry.

In June 1994 the Chairman of the House Subcommittee on Health and the Environment wrote the Director of the National Cancer Institute (NCI), asking him to convene a meeting of experts to ". . . review and make recommendations on the accuracy and appropriateness of the Federal Trade Commission's method for determining the relative 'tar' and nicotine content of cigarettes." A similar request was received from the FTC Chairman asking that NCI convene a consen-

sus conference on the topic and outlining several areas it wished to be considered.

On December 5 and 6, 1994, a meeting of the NCI ad hoc expert committee was convened under the aegis of the President's Cancer Panel to examine this issue. The committee consisted of 11 individuals from diverse scientific backgrounds and experience. The committee had the benefit of excellent presentations from 14 experts whose professional careers were not only involved in research on smoking, but who have been active contributors to this field of scientific inquiry. Two of the individual participants were cigarette industry scientists, who participated in all discussions.

From the outset of the committee's deliberations, it was clear that the intent of the meeting was not to redesign the FTC testing protocol but, rather, to examine the protocol and make suggestions for improvement, if warranted. To provide a framework for discussion, the committee was asked to consider three basic questions:

1. **Does the evidence presented clearly demonstrate that changes are needed in the current FTC protocol for measuring tar, nicotine, and carbon monoxide? If yes, what changes are required?**
2. **Should constituents other than tar, nicotine, and carbon monoxide be added to the protocol?**
3. **Does the FTC protocol provide information useful to smokers in making decisions about their health?**

I. The committee reached the following conclusions with respect to the first question.

A. The smoking of cigarettes with lower *machine-measured* yields has a small effect in reducing the risk of cancer caused by smoking, no effect on the risk of cardiovascular diseases, and an uncertain effect on the risk of pulmonary disease. A reduction

in *machine-measured* tar yield from 15 mg tar to 1 mg tar does not reduce relative risk from 15 to 1.

B. The FTC test protocol was based on cursory observations of human smoking behavior. Actual human smoking behavior is characterized by wide variations in smoking patterns, which result in wide variations in tar and nicotine exposure. Smokers who switch to lower tar and nicotine cigarettes frequently change their smoking behavior, which may negate potential health benefits.

C. Accordingly, the committee recommends the following changes to the FTC protocol:

1. This system should also measure and publish information on the range of tar, nicotine, and carbon monoxide yields that most smokers should expect from each cigarette sold in the United States.

2. This information should be clearly communicated to smokers.

3. A simple graphic representation should be provided with each pack of cigarettes sold in the United States and in all advertisements. The representation should not imply a one-to-one relationship between measurements and disease risk.

4. The system must be accompanied by public education to make smokers aware that individual exposure depends on how the cigarette is smoked and that the benefits of switching to lower yield cigarettes are small compared with quitting.

D. There should be Federal oversight of cigarette testing, but such testing should continue to be per-

formed by the tobacco industry and at industry expense.

E. The questions involved in the purpose, methodology, and utility of the FTC protocol are complex medical and scientific issues that require ongoing involvement of Federal health agencies; including the National Institutes of Health, the Food and Drug Administration, and the Centers for Disease Control and Prevention.

F. The system should be reexamined at least every 5 years to evaluate whether the protocol is maintaining its utility to the smoker.

G. When a cigarette manufacturer makes significant changes in cigarette design that affect yields, it should notify the appropriate Federal agency.

II. With regard to the second question, the committee recommends that to avoid confusing smokers, no smoke constituents other than tar, nicotine, and carbon monoxide be measured and published at the present time. Smokers should be informed of the presence of other hazardous smoke constituents with each package and with all advertisements. These constituents should be classified by toxic effects.

III. In considering the third question, the committee reached the following conclusions:

A. Information from the testing system is useless to smokers unless they have ready access to it. The information from the testing system should be made available to all smokers, including those who smoke generic brands and other brands not widely advertised.

B. Brand names and brand classifications such as "light" and "ultralight" represent health claims and

should be regulated and accompanied, in fair balance, with an appropriate disclaimer.

C. The available data suggest that smokers misunderstand the FTC test data. This underscores the need for an extensive public education effort.

As Chairman of the President's Cancer Panel under whose aegis this meeting was convened, I would like to express here my admiration and deep appreciation to the members of the NCI ad hoc committee and its expert consultants for a job well done. In transmitting this report to both the U.S. Congress and the Federal Trade Commission, it is my sincere hope that the recommendations contained herein will receive the serious and thoughtful consideration they deserve.

Harold P. Freeman, M.D.
Chairman, President's Cancer Panel

Chapter 1

Cigarette Testing and the Federal Trade Commission: A Historical Overview[1]

C. Lee Peeler

Cigarette manufacturers began advertising their products' tar and nicotine content before there was a standardized procedure for testing cigarette output. In 1955, after a series of cases challenging a variety of claims made for cigarettes (including tar and nicotine claims),[2] the Federal Trade Commission (Commission or FTC) published cigarette advertising guides. Among other things, the guides prohibited claims that a particular brand of cigarettes was low in tar and nicotine or lower than other brands "when it has not been established by competent scientific proof . . . that the claim is true, and if true, that such difference or differences are significant" (Federal Trade Commission, 1988a).

However, cigarette manufacturers continued to advertise tar numbers. In the absence of a standardized testing methodology, their claims resulted in what is often referred to as the "tar derby"—a multitude of inconsistent, noncomparable

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1 These remarks are the views of the staff of the Bureau of Consumer Protection. They do not necessarily represent the view of the Commission or any individual commissioner.

2 *See, e.g., Reynolds Tobacco Co. v. FTC*, 192 F.2d 535 7th Cir. (1951) (claims that Camel does not impair the physical condition of athletes and aids digestion); *American Tobacco Co.*, 47 F.T.C. 1393 (1951) (Lucky Strike cigarettes advertised as less irritating to the throat than competing brands and containing less tar than four other leading brands); *P. Lorillard Co.*, 46 F.T.C. 735 (1950) (Old Gold cigarettes advertised as lowest of seven leading brands in nicotine and throat irritating tars, and Beech-Nut cigarettes as providing "definite defense against throat irritation"). *See also, e.g., Leighton Tobacco Co.* 46 F.T.C. 1230 (1950) (Phantom cigarettes represented as causing no irritation of any kind).

claims that did not give consumers a meaningful opportunity to assess the relative tar delivery of competing brands. The tar derby ended in 1960, when discussions with the Commission culminated in an agreement by the industry to refrain from tar and nicotine advertising (Federal Trade Commission, 1988b).

In 1964 the first Surgeon General's report on the health risks of smoking concluded that cigarette smoking was a cause of lung cancer in men (U.S. Department of Health and Human Services, 1964). In 1966 the Public Health Service stated that "The preponderance of scientific evidence strongly suggests that the lower the tar and nicotine content of cigarette smoke, the less harmful would be the effect" (U.S. Department of Health and Human Services, 1981, p. v).

It was in this environment that the Commission initiated two major steps in 1966 to encourage cigarette manufacturers to provide consumers with comparative information about their products' tar and nicotine yields. First, it ended the ban on tar and nicotine advertising by announcing that factual statements of the tar and nicotine content of mainstream cigarette smoke could be made if they were supported by tests conducted in accordance with the so-called "Cambridge Filter method" and if they were not accompanied by claims about reduced health hazards (Federal Trade Commission, 1988a). Second, it authorized establishment of a laboratory to analyze cigarette smoke and invited public comment on what modifications, if any, should be made to the Cambridge Filter method for purposes of the laboratory's procedures and how the test results should be expressed (*Federal Register*, 1966). The modified Cambridge Filter method ultimately adopted by the Commission is often referred to as the "FTC method."

By mid-1967 the laboratory was ready to begin testing cigarettes (*Federal Register*, 1967).[3] The Commission agreed, pursuant to Senator Warren Magnuson's request,[4] to report the test results to Congress periodically, a process that continues today.

From the outset, the testing was intended to obtain uniform, standardized data about the tar and nicotine yield of mainstream cigarette smoke, *not* to replicate actual human smoking. The Commission recognized that individual smoking behavior was just that—too individual to gauge what a hypothetical "average" smoker would get from any particular cigarette: "No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion" (Federal Trade Commission, 1967). The purpose of the testing was "not to determine the amount of 'tar' and nicotine inhaled by any human smoker. but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method" (Federal Trade Commission, 1967). Indeed, the Cambridge Filter method did not attempt to duplicate an "av-

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[3] For the first dozen years of its existence, the laboratory tested only for tar and nicotine. In 1980 the protocol was modified to add testing for carbon monoxide.

[4] Expressing the opinion held at that time by many people in the Federal Government, Senator Magnuson stated that "By encouraging smokers to switch to low tar/nicotine cigarettes, we can contribute meaningfully to the physical health of our nation. Publication of the Commission's testing results is one important facet.

The Commission expressed its views concerning dissemination of tar and nicotine figures in an October 1967 letter to the National Association of Broadcasters: "The Commission favors giving smokers as much information about the risks involved in smoking as is possible and to that end favors mandatory disclosure of tar and nicotine content, as measured by a standard test."

erage" smoker but was "an amalgam of many choices" (Federal Trade Commission, 1967). Because no test could accurately duplicate human smoking, the Commission believed that the most important thing was to make certain the results presented to the public were based on a reasonable, standardized method and could be presented to consumers in an understandable manner.

The Commission next attempted to increase consumer awareness of the ratings produced by its laboratory. In 1970 it proposed a trade regulation rule that would have required disclosure of tar and nicotine ratings in all cigarette advertising (*Federal Register*, 1970). The rulemaking was suspended indefinitely a short time later, when five of the major cigarette manufacturers and three small companies agreed voluntarily among themselves to include the ratings produced by the Commission's protocol in their advertisements. That agreement, modified to reflect the discontinuance of the Commission's laboratory, remains in effect today.[5]

There are a number of ways to lower a cigarette's tar and nicotine rating, including adding filters that literally trap some of the constituents of the tobacco smoke before they reach the machine, wrapping the tobacco plug in paper that burns relatively quickly, and placing ventilation holes around the circumference of the filter so that when a smoker or smoking machine puffs on the cigarette, air is drawn into the filter and the resulting diluted mixture of air and smoke yields lower tar and nicotine ratings than the undiluted puff of smoke would yield. The last technique is often referred to as "aeration."

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[5] The American Tobacco Company did sign the voluntary agreement, but similar disclosures have been contained in its advertisements, pursuant to a 1971 consent agreement with the Commission. [*In re American Brands, Inc.*, 79 F.T.C. 255 (1971).]

These types of changes in cigarette technology have focused the Commission's attention on its protocol on two separate occasions since 1970. In both cases, the Commission has solicited public comments on certain aspects of the FTC method. However, in neither instance did the information received by the Commission form a sufficient basis for changing the protocol, even though the limitations on the predictiveness of the FTC method caused by compensatory smoking were clearly recognized by the mid-1980's. ("Compensatory behavior" is the tendency of consumers to offset the benefits of a positive change in their behavior by making a second, negative change. For example, a smoker who switches to a brand with lower tar and nicotine ratings might smoke more cigarettes each day or smoke each one more intensively, that is, inhale more deeply and/or take more puffs per cigarette.) Following is a review of the two events referred to above.

Aeration first became an issue for the Commission in 1977, when Lorillard, Inc., suggested that the depth to which cigarettes were inserted in the Commission's smoking machine be decreased when the standard dept would block some of a cigarette's ventilation holes, thereby impairing its filtration system and resulting in higher ratings than if the holes were open. The Commission solicited public comments on this question and also on whether the insertion depth should be decreased beyond the point where consumers cover the cigarette with their fingers or lips (*Federal Register*, 1977).

Of the seven cigarette companies that commented, only Lorillard supported varying the standard insertion depth. However, none of the responders addressed the question of whether the new insertion depth would be more consistent with actual smoking practices. After reviewing the comments, the Commission noted that the development of ciga-

rettes with ventilation holes near the tip had complicated the comparability of its tar and nicotine ratings,[6] but "that a change in the insertion depth would cause a lack of continuity with previous test results" (*Federal Register*, 1978, pp. 11856, 11857). The Commission decided not to modify the protocol "in the absence of information indicating that a new insertion depth would be more consistent with the manner in which smokers insert cigarettes in actual use" (*Federal Register*, 1978, p. 11857).

Another controversy concerning the test method arose in the early 1980's and involved the Brown & Williamson Tobacco Corporation's (B&W) Barclay cigarette, which was designed with a channel ventilation system rather than air holes.[7] Competitors claimed that Barclay, which had re-

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[6] Quoting its 1967 statement that the purpose of testing was not to determine the amount of constituents inhaled by a human smoker but to determine the amount generated when a cigarette was smoked by a machine in accordance with a prescribed protocol (see above), the Commission noted that:

> The point of this statement was that the FTC's "tar" and nicotine values represented valid standards for making comparisons among different cigarettes. Thus, if the consumer smoked each different cigarette the same way, he would inhale "tar" and nicotine in amounts proportional to the relative values of the FTC figures. A person who smoked a 10 mg "tar" cigarette would ingest half the "tar" he would by smoking a 20 mg "tar" cigarette providing he smoked the same way. The development of cigarettes with ventilation areas within 11 mm of the tip has complicated this simple relationship. (*Federal Register*, 1978, p. 11856)

[7] In conventional aerated cigarettes, air and smoke mixed together as they passed through the filter. Outside air drawn into Barclay's channels, however, went directly into the smoker's mouth before first mixing with any smoke; dilution was supposed to occur in the mouth, not in the filter. Competitors alleged that because the exit holes for the channels were close to the smoker's lips, they were crushed or covered by lips, thus reducing dilution.

ceived an official FTC rating of 1 mg tar in 1981, did not test accurately on the FTC smoking machine because the channels remained open during testing but were rendered inoperable in practice. After careful consideration, the Commission determined that its present test method did not accurately measure Barclay's tar, nicotine, and carbon monoxide. It revoked the 1-mg rating, estimating that Barclay should be rated between 3 and 7 mg of tar (based on testing by independent consultants) and invited comments on a number of issues relating to possible modification of its testing method, including using new cigarette holders on the smoking machine that would simulate the reduction in ventilation that occurred when people smoked Barclay (*Federal Register*, 1983). The Commission asked which modifications would yield the most appropriate results for all cigarettes and whether modification of the cigarette testing method would result in unintended consequences and affect possible innovation in cigarettes design (*Federal Register*, 1983).

The Commission also took this opportunity to reiterate that its ratings were relative; that the amount of tar, nicotine, and carbon monoxide any particular cigarette delivered depended on how it was smoked; and that in the case of ventilated filter cigarettes, delivery would be increased if ventilation holes were blocked (*Federal Register*, 1983). It then invited comments on a wide range of issues concerning compensatory smoking behavior.

> Should the Commission further examine the implications for its testing program of the issues raised by compensatory smoking behavior, including hole blocking, when consumers smoke lower "tar" cigarettes? What is the evidence that smokers use higher "tar" cigarettes differently than lower "tar" cigarettes? What is the evidence regarding the extent of hole blocking by smokers of different ventilated filter cigarettes? Are there problems regarding

> compensatory smoking behavior which are significant enough to warrant further exploration of changes in the method, beyond those necessitated by the Commission's findings concerning Barclay? What lines of inquiry would generate the most useful information if such an examination is undertaken? For example, should the Commission explore a system of categories or "bands" of "tar" content rather than specific numerical estimates? Also, should consumers be advised that the cigarettes' actual "tar" delivery depends on how it is smoked? (*Federal Register*, 1983)

Shortly after the initial comment period closed,[8] a Federal district court issued an opinion in the Commission's action against B&W over advertisements that continued to describe Barclay as a 1-mg tar cigarette, despite the Commission's revocation of Barclay's 1-mg rating [*FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd in part, remanded in part*, 778 F.2d 35 (D.C. Cir. 1985)]. During that litigation, B&W contended that "recent scientific evidence demonstrates that the FTC system is so flawed that it is itself deceptive" [580 F. Supp. at 984].[9] The

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[8] Comments responsive to the April 13, 1983, *Federal Register* notice were originally due by June 30, 1983. On June 4, 1984, however, the Commission reopened the comment period because certain information that was relevant to the questions addressed in that notice, but had been previously under a court-ordered seal, was now publicly available (*Federal Register*, 1984).

[9] B&W argued that all cigarettes were subject to compensatory smoking behavior and thus all tar numbers were "soft." The Commission acknowledged that low-yield cigarettes were subject to substantial variations in actual smoker intake but contended that Barclay tested differently on the machine from other cigarettes. The Commission's position was that the tar ratings provided a rough comparative scale; that is, a 1-mg

[Footnote continued on next page]

court recognized that compensatory smoking behavior complicated the ratings question but rejected B&W's contention that the system provided no benefit to consumers:

> The FTC system attempts only to determine how much relative tar and nicotine a smoker would get in his mouth were he to smoke two cigarettes in the same manner. B&W has utterly failed to show that the system does not do this. Nor has it shown that a better method for determining the relative health hazards of the many different varieties of cigarettes on the market is currently feasible [580 F. Supp. at 985].

The comments ultimately submitted in response to the Commission's questions about compensatory smoking reflected sharply disparate views. On the one hand, the American Heart Association (AHA), American Lung Association (ALA), and American Cancer Society (ACS) identified problems with the existing methodology, expressed concern over the impact of compensatory smoking behavior, and suggested extensive research to improve the current testing and reporting procedures.[10]

[Footnote continued from previous page]

cigarette should be comparable to all other 1-mg cigarettes, if all are smoked in an identical manner.

[10] The ALA stated that given the reality of compensatory smoking, low-tar cigarettes might not be as safe as some consumers were being led to believe and that the Commission's testing and reporting procedures were contributing to questionable advertisements for "safe" cigarettes. The ACS stated that the Commission's test method should be modified to reflect current understanding of compensatory smoking behavior. The AHA expressed its view that the Commission's testing and reporting procedures fostered the belief among consumers that low-tar cigarettes were safer than high-tar brands. However, epidemiological evidence showing a

[Footnote continued on next page]

On the other hand, Philip Morris, R.J. Reynolds Tobacco Company, and American Brands asserted that compensatory smoking behavior was not relevant to the testing methodology and that devising a protocol that accounted for compensatory smoking would require establishing a profile of the average smoker, something the Commission had previously declined to do because of the impossibility of accounting for all the relevant variables. Lorillard stated that data on compensatory smoking were very limited and therefore recommended that the existing system be kept intact. Liggett & Myers suggested that perhaps all cigarette testing should be abolished because smoking behavior could seriously affect tar and nicotine yields and smokers could not be taught to change their behavior.

In response to the Commission's question about possible implementation of a "banding" system for its tar and nicotine ratings, B&W (which had just had Barclay's rating revoked) argued that the current system caused manufacturers to emphasize small differences that might not exist, given the realities of compensatory smoking, and that it should be replaced with a system that would group products into high-tar, medium-tar, low-tar, and ultra low-tar "bands." Philip Morris and American Brands argued that banding would lead to a

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correlation between the risk of coronary heart disease and the number of cigarettes smoked per day, but not a reduced rate of such disease among low-tar smokers, suggested that smokers of those cigarettes might be engaging in compensatory smoking.

The ALA and ACS recommended that research be conducted to determine how actual intake of tar and other smoke constituents by smokers related to the FTC's ratings; following completion of this research, the Commission should test each cigarette under a range of conditions replicating actual smoking behavior and report those results with a warning that individual yield depends on individual smoking patterns.

concentration of brands at the upper limit of each category (in contrast to the existing system, which encouraged reductions across the board). American Brands also contended that banding would confuse consumers, whereas Philip Morris noted that it would substitute the Government's judgment about the significance of differences in tar ratings for that of the individual consumer:

In short, there was no clear consensus as to specific action the Commission could (or should) take to eliminate the limitations of the test method. At the same time, abandoning the testing system without instituting another method of tar testing would have been premature because then-current epidemiological evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that had occurred since the 1950's (U.S. Department of Health and Human Services, 1981).[11] Accordingly, at that time the Commission made no changes to its cigarette test method to address compensatory smoking.

In early 1987 the Commission decided to close its cigarette testing laboratory. The Commission found that closing the laboratory was necessary for several reasons, chiefly because the cost of the laboratory was significant and the Commission would have had to commit significant additional funds to continue its operation. The Commission also was persuaded that the same information could be obtained from other sources and that other means were available to verify the accuracy of industry testing results. In fact, the Commission's operation of a testing system for the industry at taxpayer expense was highly unusual. The common scenario is

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11 In 1954 the tar yield of the sales-weighted average cigarette was 37 mg (U.S. Department of Health and Human Services, 1981). By 1981 cigarettes yielding 15 mg of tar or less had 56 percent of the domestic market (Federal Trade Commission, 1984).

for the industry to conduct its own testing under Government-specified testing protocols.

Since 1987 the Tobacco Institute Testing Laboratory (TITL) has continued to test most cigarettes, using the Commission's approved methodology; the companies report the results to the Commission pursuant to a compulsory request, and the Commission publishes the results. TITL keeps the Commission informed of proposed changes in the testing procedure and solicits Commission approval for all significant changes. TITL's work is regularly monitored by the Commission's contractor, Harold Pillsbury, Jr. (this volume), who has virtually unrestricted access to the laboratory and makes unannounced visits to inspect it and check the testing process. Mr. Pillsbury also checks the data for consistency from run to run and from year to year. Most industry members also have testing facilities; however, the numbers published by the Commission are primarily TITL numbers. (Generic and private label brands, as well as new cigarettes and cigarettes that are not widely available, are not tested by TITL.)

Since the closing of its laboratory, the Commission has continued to review advertising for today's low- and ultralow-yield cigarettes for deceptive claims. In January 1995 the Commission approved a consent agreement with the American Tobacco Company, settling charges over advertisements that allegedly misused the Commission's tar and nicotine ratings by stating that consumers would get less tar by smoking 10 packs of Carlton brand cigarettes (which are rated as having 1 mg of tar per cigarette) than by smoking a single pack of certain other brands of cigarettes (rated as having more than 10 mg of tar per cigarette).

The Commission's desire to ensure that smokers have accurate and useful information about their cigarettes led to its request for the conference, whose reports are contained in this monograph.

FTC NICOTINE PROGRAM

HEARING
Before The
SUBCOMMITTEE ON
TRANSPORTATION, TOURISM, AND HAZARDOUS MATERIALS
Of The
COMMITTEE ON
ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

FIRST SESSION

May 7, 1987

Serial No. 100-42

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* * *

Mr. LUKEN. The gentleman from Kansas.

Mr. WHITTAKER. Thank you, Mr. Chairman.

The testimony that we receive today will help us review the FTC decision to close its cigarette testing laboratory. I regret, however, that the final decision to focus this hearing on this issue was only made recently, resulting in somewhat rushed preparations by both the witnesses and the members of this subcommittee. Perhaps we can work together to avoid this type of situation in the future.

Last month, the FTC pulled the plugs on their smoking machines used to test tar and nicotine levels in cigarettes. This hearing will enable us to determine whether the taxpayers should continue to pay for these smoking iron lungs.

The purpose of the FTC laboratories was to ensure the manufacturers truthfully advertised the levels of tar and nico-

tine in their cigarettes. Cigarette manufacturers also test their own as well as their competitor's products and we are told they uniformly use the FTC testing procedure. Therefore, the manufacturers' results have consistently been the same as the FTC's. The FTC believes it can depend upon the industry test results in conjunction with the competitive spirit between the individual manufacturers to ensure truth in advertising.

Some health organizations, however, question whether the tobacco industry can be trusted to issue correct measurements on its own products. They assert that there will be an inherent conflict of interest. Today's hearing will enable us to test the FTC's faith in the industry's tests and its enforcement of truthful advertising.

Mr. Chairman, I for one believe that too many people endanger their health by smoking. It is important that the public be fully informed about the content of tar and nicotine in cigarettes which cause serious health consequences.

I commend you very strongly for calling this hearing and I look forward to the witnesses' testimony which will help us determine if the FTC's laboratory is necessary to fully inform the public.

Thank you.

Mr. LUKEN. The gentleman from NJ, Mr. Florio.

Mr. FLORIO. Thank you very much, Mr. Chairman. I, too, am pleased to be here and commend you for calling these hearings.

This, I think, is the first hearing that we have had with regard to the FTC. I assume at some point before too long we will be going into reauthorization hearings for this Agency that some of us regard as a less than aggressive Agency over the last number of years, that has had its troubles. The jurisdiction of the Agency, of course, falls into two areas, the anti-trust area and the consumer protection area, which in a sense we are dealing with today. I can't but notice

in today's New York Times on the anti-trust side, on the business first page, the suggestion that the General Motors/Toyota agreement, which some of us were not enthusiastic about the FTC approving in a very cursory way years ago, that in a sense didn't pay a lot of attention to the traditional anti-trust standards and justified the merger going forward or the joint venture going forward on the basis of efficiencies, and apparently the reports today indicate General Motors has not been the big beneficiary of the efficiencies that some suggested were going to result from this somewhat strange joint venture being allowed between the number one and number three car manufacturers in the world.

Today's hearing, of course, goes to the second part of the jurisdiction, consumer protection. I think we are talking about the specific problem today but it is also an aspect of the ad substantiation responsibilities of the FTC, going into the responsibilities of the FTC in ensuring that we have nondeceptive and fair advertising.

I hope that through the course of the morning we will talk a little bit about the general approach that the commission is taking towards that area of its jurisdiction, this piece of it being of course the ability of the commission to determine whether advertising is deceptive, whether it is fair and whether it is substantiated by the facts, when claims are made.

Mr. Chairman, I commend you for these hearings and look forward to taking part in them today.

Mr. LUKEN. The gentleman from Tennessee.

Mr. COOPER. I have no opening statement, Mr. Chairman.

Mr. LUKEN. Anything further from the members?

[No response.]

Mr. LUKEN. If not, we will proceed with the first witnesses, Mr. Daniel Oliver, Chairman of the Federal Trade Commission, whom we welcome this morning. Mr. William MacLeod, who is the Director of the Bureau of Consumer Protection.

Mr. Oliver, you have submitted a statement which without objection will be admitted into the record. You and Mr. MacLeod may proceed to acquaint the subcommittee in any way you see fit with your views on the issues that have been raised this morning.

STATEMENT OF HON. DANIEL OLIVER, CHAIRMAN, FEDERAL TRADE COMMISSION, ACCOMPANIED BY WILLIAM C. MacLEOD, DIRECTOR, BUREAU OF CONSUMER PROTECTION

Mr. OLIVER. Thank you, Mr. Chairman, members of the committee. We were originally asked to be here today to discuss authorization of the Federal Trade Commission. I think it is unfortunate that consideration of authorization has been postponed in order to discuss the unanimous decision the commission made almost 3 months ago to close the cigarette laboratory.

The commission has provided the subcommittee with a statement on this subject. In addition, we have provided both responsive documents and written answers to the questions presented to us as late as last Friday.

Mr. LUKEN. Did you submit anything to the committee before last Friday?

Mr. OLIVER. I believe we have submitted reports on why the cigarette laboratory was closed; yes.

Mr. LUKEN. When was that?

Mr. OLIVER. We received the request for documents on Friday.

Mr. LUKEN. Pardon me for interrupting.

Mr. OLIVER. I believe the documents have been submitted.

Mr. LUKEN. In your presentation, I thought there was an inference that the subcommittee had been advised some time ago as to the closing of the lab.

Mr. OLIVER. I believe Congress was made aware 3 months ago, roughly 3 months that the laboratory had been closed.

Mr. LUKEN. I apologize. We will go into that in the questioning. If there is some notice here, I would like to be looking at it while you are testifying.

Mr. OLIVER. As those materials show, on February 13, 1987, the commission voted unanimously to terminate the cigarette testing laboratory. The information produced by the laboratory duplicates data obtainable from other sources. Government facilities are available to verify that information. In addition, the cigarette companies themselves have every incentive to test their rivals' products to ensure their advertised claims are accurate.

The commission saw no benefit to consumers in continuing to expend taxpayer dollars on the laboratory. Those taxpayer dollars can be deployed more effectively in other law enforcement activities.

The FTC notified the appropriate committees and Members of the Congress after the commission's decision was made, and the House and Senate Appropriation Committees approved the commission's action. The cigarette laboratory has since been closed.

As I have already said, I regret that this small matter, undertaken without controversy and without objection has displaced discussion of the FTC's authorization, which was supposed to take place today.

Mr. William MacLeod, on my left, the Director of the Bureau of Consumer Protection, is very familiar with the details of the former laboratory's operation. If there are any questions, we will attempt to answer them.

[The prepared statement of Mr. Oliver follows:]

STATEMENT OF FEDERAL TRADE COMMISSION

I am happy to be here today to present the commission's statement regarding its decision to terminate its in-house cigarette program. The commission staff's review of the continuing need for our facilities began in 1982. During its review, staff consulted with representatives from the Surgeon General's Office, the Office of Smoking and Health, the National Cancer Institute, the major health groups, the tobacco industry and Congressional staff members.

The commission unanimously voted to close the Cigarette Testing Laboratory on February 13, 1987. That decision was based not only on the present costs of running the laboratory and the additional funds that would be required in order to update and maintain the laboratory, but on the fact that those costs would be incurred even though the same information is currently being generated by the cigarette industry and can be obtained from it at little additional cost to the government. On February 19, the commission sent letters to the Chairmen of the Senate and House Appropriations Committees notifying them of its decision. On March 27, the Senate Appropriations Committee orally notified the commission that it had no objections to the closing of the laboratory. By letter of April 9, the Chairman of the House Appropriations Committee notified the Commission that he also had no objections. After receiving these approvals, the commission formally announced the closing of the laboratory on April 15, 1987.

In 1966, the commission initiated several actions for the purpose of encouraging cigarette manufacturers to provide consumers with accurate comparative information concerning

the tar and nicotine content of the cigarettes that they smoke. In that year, the commission ended a 6 year ban on tar and nicotine advertising, adopted a uniform testing system measuring tar and nicotine content, and sent a letter to the domestic manufacturers approving their dissemination of tar and nicotine claims, if such claims were supported by tests conducted in accordance with the approved method. In 1966, the commission also created the Cigarette Testing Laboratory to facilitate the dissemination of tar and nicotine information pursuant to this uniform testing standard, and begin to provide the results of its testing periodically to Congress. Since 1971, the cigarette industry has included tar and nicotine ratings in all advertising companies. The current voluntary agreement among the companies requires the companies to test new and reformulated cigarettes for tar and nicotine between commission testing periods using the Commission standards. In addition, the companies often test each others brands for accuracy.

Each of the major cigarette companies either has a laboratory of its own or has access to a laboratory to do tar and nicotine assays. In addition, the Tobacco Institute Testing Laboratory (TITL), a private laboratory run by the cigarette industry, does tar and nicotine testing. The methodology, procedures and processes that the companies and TITL use are identical to those that the commission has followed. The equipment used by TITL is practically identical to the equipment that the commission has used, except that in many cases the equipment is newer or is automated.

I wish to emphasize that the closing of our in-house facilities will not significantly affect our ability to ensure the accuracy of tar and nicotine claims. Indeed, the commission has only recently completed a vigorously contested litigation involving the accuracy of tar and nicotine claims made by a major manufacturer. Importantly, that case arose not as a result of commission testing or monitoring but because of a competitor's complaint. The commission will continue to

monitor advertising for deceptive tar and nicotine claims and bring appropriate enforcement actions. Because tar and nicotine ratings are an area of intense competition within the industry, we expect that if a company were to publish incorrect ratings, we will hear quickly from its competitors. In addition, we will continue in the future to collect tar and nicotine ratings from the companies and report that information to Congress. As with all data that we collect from the cigarette companies, we will scrutinize the ratings for accuracy and reliability. If we should have a question about any individual rating, we have access to testing facilities at Oak Ridge National Laboratory.

In sum, the commission established its laboratory in order to facilitate the use of a standardized methodology for the testing of the tar and nicotine content of cigarettes. In this regard, we have been highly successful, for the procedure followed by all the companies is the one used by the commission and is in fact called the "FTC method." Having established the commission's methodology as a uniform testing standard, the commission concluded that there was no longer a need for the Federal Government to duplicate the testing program already being conducted in the private sector, which provides the same information. We have every expectation that accurate tar and nicotine information will continue to be provided to consumers without the unnecessary expense of governmentally supported testing. If for any reason that expectation proves incorrect, we are prepared to take vigorous corrective action.

Thank you.

Mr. LUKEN. Mr. Oliver and Mr. MacLeod, would you say that the FTC method for testing, that is a term of art now, the FTC method, isn't that right?

Mr. OLIVER. That's correct.

Mr. LUKEN. I believe you have said before this is one of the principal missions of the lab, to develop a method of testing cigarettes; is that right?

Mr. OLIVER. That is correct.

Mr. LUKEN. Is that the only purpose of the lab, testing a method? It was also the purpose of the lab to actually test the cigarettes; isn't that right?

Mr. OLIVER. Yes. Obviously, we tested the cigarettes. The lab tested the cigarettes after the method was established. Since that time, the method has become the standard method and it is used both by the cigarette companies themselves and by the government facility in Oak Ridge, TN.

Mr. LUKEN. That method is a very useful tool that we now have for protecting the consuming public, the public consuming cigarettes; is that right?

Mr. OLIVER. That's correct.

Mr. LUKEN. Therefore, the laboratory, the facility has been very instrumental in developing a method. If we cancel the laboratory, if the laboratory is history, we would be denied the benefit of possibly a new method being developed, such as the method which this laboratory has developed. Would you agree?

Mr. MACLEOD. Mr. Chairman, if I may, I would like to address that question. The laboratory itself was established as you asked, to try to establish a standardized methodology for testing cigarettes. Indeed, the lab accomplished that. The method that the lab is using today is not significantly different from the method that was established in 1966.

The individuals using the lab are primarily or were primarily operating simply the testing function. The kind of scientific research that would go into developing new and improved methodologies is the kind of research that is be-

yond the capability of the employees we have at the Federal Trade Commission.

Mr. LUKEN. Shouldn't we be working to develop the abilities of the employees that you have at the Federal Trade Commission rather than consigning the operation which has been very beneficial to the ash can?

Mr. MACLEOD. Mr. Chairman —

Mr. LUKEN. I don't think you have stated before that is the case, that you had the choice of either improving the lab, making it more effective or of closing it. Now you have been saying that you closed it because the work can be done by other agencies or private agencies.

Mr. MACLEOD. The Federal Trade Commission is virtually entirely an agency of economists and lawyers. We are not an agency of scientists. We do not do general testing of various products. We cannot pretend to have the expertise to improve or come up with a state-of-the-art testing on any of the advertising that we regulate in the course of our enforcement priorities.

What we have done and what we continue to do is examine the scientific community and seek comments and advice on whether the method that we are using can be improved, whether it should be improved, whether we can agree upon better methodology to test cigarettes. I suspect that research will never end, but we certainly do not have the capability at the Federal Trade Commission. This is a very sophisticated and very expensive scientific process and the kind of process I would expect would be better undertaken either by private researchers or government facilities that have much better scientific abilities than we at FTC.

Mr. LUKEN. We have just established that this lab has developed the FTC method, which the FTC has taken credit in the past for and it has been generally recognized that the

FTC method of testing cigarettes is the one that is used universally now; isn't that right?

Mr. MACLEOD. The lab established for the purposes of the Federal Trade Commission the methodology which itself was not developed by the Federal Trade Commission. We implemented a development, the Cambridge testing method, which was a product of the scientific community generally. As any research product, it is a culmination of many efforts by many scientists around the country to determine the precise and best means of testing a cigarette. That was done over 20 years ago. So far, that is the methodology that we are still using at the Federal Trade Commission.

Mr. LUKEN. These companies are not required by law or regulation to use this FTC method; are they?

Mr. MACLEOD. No, they are not. If they advertise that they use the FTC method, of course the laws of deception would require they actually use the FTC method.

Mr. LUKEN. What if a company wanted to change its testing procedures? Would it have to obtain approval from the commission or at least demonstrate that its method is equivalent to the commission's testing method?

Mr. MACLEOD. In the litigation that arose from the Barclay cigarette issue of a few years ago, in which there was a question as to whether the FTC testing methodology accurately tested the tar and nicotine delivery of Barclay cigarettes, that issue was addressed by the courts. The answer that the courts gave was we cannot force a company to use nor can we approve in advance the kind of testing a company uses. We can make sure that the testing a company uses is an accurate test, especially as that accuracy relates to the FTC method. The court decided the company could not simply indicate—

Mr. LUKEN. Hasn't there practically been an uniformity in using the FTC method?

Mr. MACLEOD. There has practically been uniformity but we recognized in the Barclay case that the FTC methodology does not accurately measure the tar and nicotine delivery of that particular cigarette.

Mr. LUKEN. That particular cigarette, because of other reasons. If one of the tobacco companies developed an improved testing procedure, which provided more accurate information, wouldn't this destroy that uniformity? Now that we don't have a laboratory that is the standard.

Mr. MACLEOD. I would fully suspect that, perhaps by the year 2000, there will be a methodology in the U.S. that is an improvement on the methodology that we use at the FTC.

Mr. LUKEN. Leaving it up to the tobacco companies to do the testing, leaving this health procedure to the tobacco companies which deny basically there are any health considerations in smoking cigarettes, the tobacco companies are going to come up with a new methodology? Is that what you are saying?

Mr. MACLEOD. There is intense competition to measure this kind of information and measure it accurately.

Mr. LUKEN. Intense competition in the tobacco industry; is that right?

Mr. MACLEOD. There is no question about that.

Mr. LUKEN. That has been historically true; right? If we look at the point in history of where tobacco companies are today, they are under seize, are they not? If tobacco companies are under seize from the public and by Government, they just might have a tendency to ban together, to conspire, to collude, to be concerned more about the industry which is in danger of being wiped out, than to be worrying about their petty differences in competition with other companies. Might that not be the case?

Mr. MACLEOD. As it has been said in other contexts, I would be glad to see that. They could go ahead and make my day. I have a number of lawyers who enforce advertising law and we have a bureau that enforces the competition laws of the United States, and if that kind of activity were undertaken, they would be subject to prosecution by the Federal Trade Commission.

We have relied on complaints from the industry in the past and it has worked.

Mr. LUKEN. Why don't you depend upon cigarette industry lawyers, if you want to depend on cigarette company laboratories, rather than your own lawyers? I might be making a rather broad comparison or analogy. You are saying we should depend upon cigarette company laboratories and their testing methodology and the forces of competition. Why don't you depend upon their lawyers? Why should we pay lawyers for the FTC? Why shouldn't we depend upon the lawyers of Brown and Williamson to contend with the lawyers of the other companies and go ahead and fight it out in civil court? Why should we even sustain the FTC, according to your theory that we ought to allow the laboratory studies to be made by the companies and on the theory of competition?

Mr. MACLEOD. There are several answers to that, Mr. Chairman. I would like to elaborate first of all on the answer that I gave. We do have in place the measures that will allow us to check, to find out whether the truth is being told. Those measures are the same kinds of measures that are used by the FDA, and the Department of Transportation, in checking the accuracy of measurements of constituents, and the performance of products those agencies regulate.

It is generally the case in the regulation of measurements of performance and constituent standards that the Government leaves it to the industry with appropriate checks and balances upon the performance that the industry reports.

We would have a multi-billion budget if we had to test independently the substantiation for the advertising of every product we regulate.

Once again on the competition issue, I think it is important. We are not relying upon the lawyers. We are not relying upon the companies. We are relying upon the forces of competition that will make sure that one company will not try to get a leg up on another company with a false or deceptive claim of tar and nicotine delivery. That is precisely the way the Barclay litigation resulted.

Our machines were fooled by the Barclay measurements. We did not know, even though we were testing the cigarettes, that the cigarettes delivered a different measure of tar and nicotine until competitors came in and told the Federal Trade Commission there was a problem. That is how that case began.

Mr. LUKEN. Does every tobacco company have a laboratory?

Mr. MACLEOD. Every tobacco company either has a laboratory or has access to laboratories that it uses on a regular basis.

Mr. LUKEN. Those might be considered weasel words, "or has access to," like the Tobacco Institute?

Mr. MACLEOD. The Tobacco Institute does have a laboratory as well.

Mr. LUKEN. The companies that have access to laboratories, one of those laboratories they have access to is the Tobacco Institute. Isn't it your anticipation the Tobacco Institute laboratory will be utilized by the companies?

Mr. MACLEOD. Yes, indeed, we expect it to. We expect to pay regular visits to the Tobacco Institute laboratory.

Mr. LUKEN. The Tobacco Institute doesn't foster competition between companies within the tobacco industry. It is an institute which is an industry facility; is it not?

Mr. MACLEOD. Yes; it is.

Mr. LUKEN. You are relying upon the Tobacco Institute facility to replace at least in part the FTC laboratory? The Tobacco Institute represents the tobacco industry, which we could hardly rely upon to give us trustworthy information about the health effects of tar and nicotine in cigarettes; isn't that right? Would you rely upon the Tobacco Institute to give you accurate information? Would you trust it?

Would you trust the Tobacco Institute's laboratory to give you reliable information on the health effects of tar and nicotine in cigarettes? Is that a fair question?

Mr. MACLEOD. Yes; that's a fair question and I will be glad to answer it. If the Tobacco Institute were the only alternative to the FTC testing laboratory, we would not have recommended closing the laboratory and I suspect the commission would not have voted to do so. The Tobacco Institute's laboratory is only a small part of the mechanism that we can rely upon to ensure that there is accurate reporting of tar and nicotine numbers to the public.

Furthermore, we will be paying visits, as I indicated earlier, to the Tobacco Institute, just as our fellow regulatory agencies pay regular visits to the testing facilities of other companies in other industries to make sure that the FTC methodology is being used. With this methodology, which itself is very standardized—there is not much room for cheating. It is a very mechanical, a very routine and a very certain process.

Mr. LUKEN. You are going to be making visits and you have described your FTC as lawyers and accountants and other kinds of specialists, but not laboratory technicians or scientists, but you are going to be making visits to make de-

terminations on these scientific issues, without the assistance of a laboratory to back you up, without the scientists to back you up; is that right?

Mr. MACLEOD. No. The scientists that I mentioned, that the FTC does not have in abundance, are the kind of scientists that we can expect to engage in the sort of original research that would develop improved methodologies and find the next generation of accurate testing, if anyone were to find that generation.

We do have in our employ the individual who ran the testing laboratory and while that individual is about to retire, we can use him until then and we do have access to independent scientists that we use on a contract basis.

As a matter of fact, Mr. Chairman, in the Barclay litigation, the Federal Trade Commission relied upon experts, independent experts that we found, as we often find in any kind of litigation, who could verify the testing that was being done for that litigation and make sure that the testing being done and the numbers being reported in the course of that litigation were accurate. We definitely have access to the kind of expertise that we can use to ensure accuracy.

We don't have the kind of budget to hire these people and have them as full time employees.

Mr. LUKEN. It seems to me that what you are saying is you are depending on the present picture, the present structure in the industry, but once you disband or you have disbanded and if you don't reinstitute the laboratory, you are not going to have the scientists to back you up, you are not going to have the procedures, you are not going to have the ability to make these tests, and in the future the tobacco industry is going to govern. They can develop the Tobacco Institute laboratory, the tobacco companies can decide to use the Tobacco Institute, and all you can do is come in and monitor because you can't administer any competing tests or develop any competing methodology.

But let me ask you one more question. I don't want to take up all the time here. I would like your comments. I refer to a Consumer Reports of January 1983, and would you comment on this statement? In reporting on the controversy of the Barclay case in Advertising Age, a top tobacco executive commented, "Every company in the cigarette business knew how to make a product that would fool the FTC machine. None of us had the nerve to take the chance B&W has taken. So far the Barclay filter has been a very successful marketing tool."

Mr. MACLEOD. I have two comments on that, Mr. Chairman. My first comment is Barclay tried and the FTC caught them. My second comment is that to the extent Barclay is successful, it is now being advertised with accurate tar and nicotine figures and it could well be that at those advertised figures, the Barclay product is a product that still generates consumer demand.

I would like to respond to your last question because I would not want to leave a misunderstanding as to our access to facilities. There is a government testing facility at Oak Ridge, TN with which we can generate competing information and which we can use and have used in the past to generate accurate technical information regarding tar and nicotine figures. That equipment, in fact, is more modern than the equipment we have at the Federal Trade Commission, so we do have the backup capability to generate competing data.

Mr. LUKEN. Are nonmembers allowed to use the Tobacco Institute's testing facilities, do you know?

Mr. MACLEOD. Yes, they are.

Mr. LUKEN. So the whole industry could use it?

Mr. MACLEOD. Yes, as far as I am aware.

Mr. LUKEN. From this testimony, my preliminary observation is that we might consider the alternative that you had,

which is to improve the laboratory, improve the facility rather than consigning it to history.

I have utilized my time and I will yield to the gentleman from Kansas.

Mr. WHITTAKER. Thank you, Mr. Chairman.

I would hope that in the course of this morning's hearings we might even have a chance for a second round because I think you are pursuing an excellent line of questioning.

Mr. Oliver, I would like to direct my first question to you. One of the main objectives of today's hearings is, of course, to review the FTC's enforcement of the prohibition against false advertising as it relates to cigarette advertising and unfair methods of competition as that prohibition relates to the cigarette industry. Earlier this year, you testified before this subcommittee on legislation that would ban all cigarette advertising. At that hearing, it was alleged that large, diversified companies which owned tobacco companies are using their ability to purchase a great number of advertisements to pressure newspapers and magazines not to run public health advertisements about the health risks of cigarettes. It was even suggested that these companies discouraged the placement of cigarette ads in certain sections of the newspaper, such as up next to obituaries or up next to other health-related stories.

Has the FTC ever looked into such allegations as an unfair method of competition?

Mr. OLIVER. I am not aware of any. It is possible they have before I got there, but I am certainly not aware of any. To the extent that what is involved is editorial judgment of the paper in question, I doubt that we would have jurisdiction.

Mr. WHITTAKER. I would have to question your logic on that, Commissioner, because if anything, when tobacco com-

panies buy up Nabisco and General Foods and other consumer products unrelated to tobacco, and then, from the collective purchasing power of their advertising, tell the newspaper up front that they cannot run health stories or place those ads up next to health stories, or up next to obituaries, or they will have those ads cut, I would see that as unfairly competing with the public's right to information.

Mr. OLIVER. That could be. We have received no complaints on that score, and my guess would be that if that were a standard practice going on for any length of time, the commission would have received some kind of complaint on it. Anything is possible, but it is hard to think that that kind of activity could be kept secret. It is hard to think anything can be kept secret over any considerable period of time, and I would suppose that by now the Federal Trade Commission would have received some kind of complaint on that score. To my knowledge, we have not.

Mr. WHITTAKER. Could I assume, then, that you are leaving the door open for someone to bring this information to you, to file a complaint, and that the Commission will then conduct an investigation?

Mr. OLIVER. I would think so, yes.

Mr. WHITTAKER. We all know that cigarettes as well as many other products have very negative health effects. Does the FTC view its role as determining or informing the public about those health effects?

Mr. OLIVER. Our role is to make sure that such advertising as is done is truthful. Of course, as we know, the Surgeon General's warning which is on all cigarette ads and cigarette packages has penetrated to something like 90 percent of the community. Polls show that 90 percent of the people understand that smoking is, in fact, hazardous to your health. Our job is not to present the information; our job is to make sure that such advertising as takes place is accurate.

Mr. WHITTAKER. Is truthful.

Mr. OLIVER. Yes.

Mr. WHITTAKER. So you do not see your role as that of warning the public about the health effects of cigarettes. If that be the case, then, isn't it the role or wouldn't it more appropriately be the role of agencies such as the Food and Drug Administration or commissions such as the Consumer Product Safety Commission to warn the public about the dire health and safety dangers?

Mr. OLIVER. I think the Department of Health and Human Services has that jurisdiction, not the FTC.

Mr. WHITTAKER. Please respond to my question. Do you see a role for the FDA and, for that matter, the Consumer Product Safety Commission? If they are concerned about something that could take 20 lives in a year, here is an issue that takes 350,000 lives a year.

Mr. OLIVER. Mr. Whittaker, that could certainly be true. I haven't thought about the matter, so I really couldn't give you a definitive answer, but that could certainly be true.

Mr. WHITTAKER. I am just curious. When the Commission began to consider shutting down the testing program, did you explore, the possibility of some other Federal agencies taking over this role?

I think there is a legitimate concern, and the Chairman expressed it, too, about putting the fox in charge of the chicken house, of letting just the tobacco companies themselves monitor their own progress. Did you explore with the Food and Drug Administration or the Consumer Products Safety Commission the possibility of their taking over cigarette testing?

Mr. OLIVER. Let me say first of all that I will let Mr. MacLeod answer that. I think we did not, but he may know better than I do. But I want to go back, if I may, and respond

to something else you said. I don't see in any way that we are abandoning the field to the nefarious cigarette companies to distort the data. I think there is a misimpression that that is the result of or will be the result of the FTC's decision to close down the laboratory. I think that is incorrect, and I think it certainly misreads the material that we have sent to the Congress.

Our point is that testing will continue, it will continue both by the industry itself—which does not test as an industry but as individual rivals within a particular industry testing both their own and their rivals' products—and in addition to that, we always have the option of going down to the government facility in Oak Ridge, TN and checking up, on any kind of basis we like, on the information that has been provided by the cigarette companies.

So we are not simply abandoning the field. We are trusting to some extent to competitive forces in the marketplace, rivals making sure that their rivals' product testing has been done accurately, and then we also have the ability to spot check at Oak Ridge, TN, a Government facility.

I think that the idea that somehow we are simply abandoning this to the industry, which will instantly collude to produce joint numbers, is very mistaken. I think the $200,000 we have can be deployed more effectively in other law enforcement activities.

Mr. WHITTAKER. I appreciate your comments but I would still like a response to my question. Did you contact either the Food and Drug Administration or the Consumer Products Safety Commission to see if they could take over the testing program?

Mr. MACLEOD. Thank you, Mr. Whittaker. Yes, indeed, we have talked with a number of other Government agencies over the years.

Mr. WHITTAKER. Please identify them.

Mr. MACLEOD. We have spoken with FDA, we have spoken with FDA, and—

Mr. WHITTAKER. How about the Consumer Product Safety Commission?

Mr. MACLEOD. The Consumer Products Safety Commission has no legal jurisdiction over cigarettes now, so for them to have an interest in the matter would probably require some kind of legislation.

Mr. WHITTAKER. Do you assume, then, that the BATF and the FDA currently have jurisdiction?

Mr. MACLEOD. Pursuant to a liaison agreement with the FDA, the FTC has primary jurisdiction over advertising: There is an interest in those agencies. As a matter of fact, the FDA has expressed the desire and has agreed to take some of the equipment that we have in the cigarette lab. They do have some uses for—

Mr. WHITTAKER. Recently they have done that?

Mr. MACLEOD. Yes, indeed, since we have closed the lab. Our responsibility now is to find the proper disposition for the laboratory equipment, and the FDA has agreed to take that equipment, some of the equipment from us.

Mr. WHITTAKER. Have you had any communication from FDA that they consider it within their purview to begin assuming some of this responsibility? I find that encouraging.

Mr. MACLEOD. No, we do not have that now. There are a number of Government agencies over the years that have expended a tremendous amount of resources in educating consumers. The Surgeon General, of course, comes to mind, and there are a number of other Government agencies. As a matter of fact, the Federal Trade Commission in its involvement with the advertising—the rotational warnings of cigarettes today, and the earlier Surgeon General's warning on

cigarettes, were all matters that had the deep involvement of the Federal Trade Commission, and this is now an education program that is going on with every single advertisement that is run in the media every day. So there is a great deal of consumer education that is actually going on now. It is largely embodied in the legislation governing the cigarette industry.

Mr. WHITTAKER. Do you recall offhand who it was within the FDA that you had your initial contact, with or did they contact you?

Mr. MACLEOD. No. We don't have an expression from the FDA that they are expressly interested, and I cannot answer right now whether they have jurisdiction precisely over the issue. Our reading of some of the law—and as I say, we are not FDA experts here—is that their jurisdiction would not extend to smoking. Their interest in some of our equipment has applications beyond that of smoking, and they could easily use the equipment for their other scientific methods.

So I am not sure whether there would need—I would be glad to provide an answer to the committee for the record, but I am not Fire right now precisely the extent of their jurisdiction and whether it would allow them to take up the responsibilities.

Mr. WHITTAKER. Mr. MacLeod, I must confess that I am aware that through, either historical accident or very devious design, the FDA and the Consumer Product Safety Commission have been prohibited from addressing one of the greatest health risks this Nation has ever faced, tobacco products. It is ironic that the tobacco lobby and its forces were so successful in the early years in removing these products from the logical jurisdiction of those Federal agencies who are empowered to protect human health and well being.

I was in a sense hoping that you would share your insight as to whether you thought that was truly appropriate and if you would lend your support to the FDA or the Consumer Products Safety Commission being given jurisdiction over

tobacco products—even though we may have to legislate it from this level.

Mr. MACLEOD. The Agency with which we have had the most conversations has been the BATF. They have been the ones who have expressed interest in the past. However, our most recent conversations with BATF have indicated that they are not interested in assuming these functions. I would hesitate to give you a legislative recommendation on behalf of the Federal Trade Commission.

Mr. WHITTAKER. I think that many on this panel acknowledge, and for that matter, the American public, that tobacco consumption and addiction is a very, very, serious problem. Tobacco is a drug and it is only logical that as we proposed through our hearing, that we begin to consider allowing the FDA to have jurisdiction over these products.

Mr. FLORIO (presiding). The time of the gentleman has expired.

Let me, Mr. Chairman and Mr. MacLeod, make two observations and then ask a couple of questions. One observation follows up on the gentleman from Kansas' observation. I know of my own knowledge that there are Members, particularly on my subcommittee that has jurisdiction over the Consumer Products Safety Commission, that are pointing to this action that the commission is taking—that is, the FTC is taking—so as to justify, if there was a need for justification—to introduce legislation to modify the Consumer Products Safety Commission jurisdiction so as to specifically give that commission authority to deal with tobacco and tobacco products.

So it may very well be that your action is going to fuel the interest in providing at least some Agency. As the gentleman, Mr. Whittaker, stated, there is virtually no Agency that has any jurisdiction over this area.

The second observation would be that your line of explanation as to why you feel comfortable with competitors out there in a sense being counted upon to tattle on someone that goes and does something inappropriate in terms of advertising may not be appropriate in the tobacco field. I suspect there is no problem with one cleaning product telling on somebody else, saying that the "whiter than white" is really not justified, but when you talk about tobacco products, potentially you can have one company telling on another company in a way that goes to the very viability of the industry. That is clearly not the case with toys, that is not the case with regard to cleaning products.

So I think the analogy and the free marketplace theory breaks down when you are talking about the whole question of cigarettes and health impacts that may not be reported correctly between the various competitors.

Mr. OLIVER. May I respond to that? Just recently we had a case in which precisely what you are saying is unlikely to happen did happen. One cigarette company came in and tattled on another cigarette company. The product in question had, if you like, fooled the FTC's testing machine and fooled the FTC. A rival company came in, told us about it, and we brought an action against the company that produced the cigarette that had fooled the machine.

Mr. FLORIO. The nature of the deficiency was what? The effect that was tattled upon.

Mr. OLIVER. The way the filter had been constructed produced a result in the machine which was different from the result that you actually got from smoking. So one company came in and tattled on another one. That is competition.

Mr. FLORIO. If deficiencies in the product and the advertising go to the question of, in a sense, advertising that there is a basic health problem associated with any of the brands, do you really expect somebody else to be in saying that ciga-

rettes, in accordance with this degree of advertising, this particular brand is going to cause a serious health problem?

Mr. OLIVER. But that is not what the cigarette testing lab does. The cigarette testing lab tests the tar and nicotine content of cigarettes. It doesn't test the general health of or measure whether smoking is dangerous to your health. The Surgeon General has said that. So the cigarette lab has nothing, it seems to me, whatsoever to do with what your concern is. In terms of competition, competition did come in and tattle on the competition that their cigarette product was not as advertised.

So we brought a successful case precisely on the information brought to us by a rival company.

Mr. FLORIO. Let me shift very briefly to get the commission's position with regard to the provision in the Senate authorization that will eliminate the commission's authority to deal with unfair advertising. Is the commission supporting that?

Mr. OLIVER. The commission has supported that as a way, we hope, of increasing the speed with which authorization legislation could get through Congress.

Mr. FLORIO. That is the justification?

Mr. OLIVER. Well, and also we—

Mr. FLORIO. How about the merits? Do you feel comfortable not having unfair advertising jurisdiction?

Mr. OLIVER. Yes, although I might not have thought myself to put that limitation in, but the commission has discovered over the years that conforms rulemaking has not been an efficient way to regulate advertising. This restriction goes to rulemaking, not to bringing individual cases. Because rulemaking has proved, I think, to be little used and not terribly successful, it is the Commission's feeling that very little is given up by this restriction.

Mr. FLORIO. Let me make two observations. One, I am intrigued by your thought that you can expedite the process by supporting the exemption of unfair advertising inasmuch as that was the single item that held up the conference report being approved, the conference report being formulated in the last session of the Congress. Everything else was resolved. That one issue was the issue that stopped the reauthorization for the first time. So I am not sure your premise is correct, if that is your premise.

More importantly, we will be left with no authority for the FTC to take action in those instances that are not overtly deceptive and yet tradition has regarded as sufficiently offensive to be acted upon under unfairness jurisdiction. For example, your staff prior to your coming into office has in the past suggested that there be rulemaking when there was a conscious determination that some advertisers were targeting youth groups for alcohol consumption. There have been recent suggestions and I have a quote in the paper about recent cigarette advertising is seen as targeting young people.

This whole idea of something less than a fraudulent, deceptive representation, that nevertheless is regarded as unfair. If there is a basketball player standing there smoking saying, "I've been smoking since I was 17 years old and I've got 30,000 points that I've scored," that would be something that would not be deceptive and yet the sense is that that is the type of activity that you ought to have jurisdiction to deal with.

Mr. OLIVER. But we do have jurisdiction to deal with that in an individual case, and if we haven't even brought an individual case on it, then we would say that the activity is not prevalent in the industry.

Mr. FLORIO. How do you deal with it if it is prevalent, though?

Mr. OLIVER. The FTC would not go into rulemaking unless it discovered that the activity in question was preva-

lent. In the case of the activity you mentioned, if the FTC has not even brought a single case, it seems to me fair to say that at least in the FTC's judgment, that action is not prevalent in the industry.

Mr. FLORIO. What you are advocating is that even if it is prevalent—

Mr. OLIVER. If I may finish.

Mr. FLORIO. No, let me just stay with that point. We have a time limitation. If the practice is prevalent—and of course, we are inclined to change the law so as to include prevalency as a test for rulemaking—if the practice is prevalent, you are saying that you still don't want rulemaking capability, rulemaking authority in unfair advertising instances.

Mr. OLIVER. No, that is not what I am saying.

Mr. FLORIO. Then tell me what you are saying.

Mr. OLIVER. What I am saying is that if the FTC has not brought a single case of the kind that you are talking about, then the FTC's judgment is that there is not even a single case out there, and if there is not a single case out there, then it is obviously not prevalent in the industry.

Mr. FLORIO. You are not responding to my question, though. My question is let's assume that there is a prevalent practice of unfair advertising, as your staff suggested to you, with regard to targeting college campuses for chug-a-lug contests. Let's assume that there is this prevalent practice. You are suggesting that if we eliminate rulemaking capability for unfair advertising, you will not have any ability to do anything, and I assume you are saying that is good.

Accept my premise. Prevalent practice of unfair advertising. You are exempting the advertising industry. What do you do?

Mr. OLIVER. Let me say two things, if I may. The first is that even if we had jurisdiction, and we do now, even given

having that jurisdiction, the FTC has discovered that rulemaking takes a very long time, and I think, therefore, it is more efficient to bring a single case against the first offender in order to stop the practice before we go to rulemaking.

It is interesting, perhaps, that the staff, while it may have suggested a rule, apparently never was able to bring a successful case against one of these offenders that it discovered. So if the staff felt that enthusiastic about a rule, why didn't the staff also bring sufficient activity to the Commission's attention so that a single case could be brought? If they didn't bring that, it suggests that there was not enough activity for a rulemaking.

Mr. FLORIO. Let me ask this, and I'll conclude and yield to someone else.

But I mean it's fairly clear that your bottomline conclusion is that even if you find a pattern of activity that constitutes unfair advertising, your position, as I understand you've just suggested it to us, in supported the exemption that's being advocated is that the process takes too long, and therefore you don't want any authority to deal with a pattern of unfair and advertising practices.

Mr. FLORIO. I don't know what that means. What do you mean? Whose compromise?

It has not been the law. You still have—

Mr. OLIVER. Oh, yes, indeed, we have it, and we will bring it, if we found a practice that was prevalent in an industry today; we could start a rulemaking if we had the authority. But the point is, if you find a case—in order to find something that's prevalent, you have to find at least more than one; you have to find more than one activity.

Mr. FLORIO. Fine.

Mr. OLIVER. And if you do—

Mr. FLORIO. What I'm suggesting is that you ought to have the authority to be able to go publish a rule prohibiting a pattern of unfair advertising.

Mr. OLIVER. What I am saying is, it is faster—everything the Commission has done has shown that it is faster to bring a single case than to go through rulemaking. Rulemaking—

Mr. FLORIO. Well, we're arguing in circles. But I think it's fairly clear—I think it's fairly clear that the policy that you're advocating is to totally take away—

Mr. OLIVER. No.

Mr. FLORIO. The authority of the Agency to not do things. I mean, we're going back to fundamentals of administrative law. Administrative law and rulemaking is not to have to go through case by case by case. The cases presuppose that someone's already been injured. The rulemaking process is to spell out a course of conduct, so that future instances will not occur.

Do you concede that rationale?

Mr. OLIVER. Yes, certainly. But there are more effective ways to do it.

I'm interested not in rulemaking; I'm interested in having an effect for the benefit of consumers. If I can have a faster and better effect by bringing a case instead of making a rule, I think it serves the consumers' interest better.

Mr. FLORIO. The case deals with the one instance. So you've got to go out and let all the consumers be injured one by one by one, and you, after the fact, bring the case?

Mr. OLIVER. In the case of the cigarette industry, which is what we're talking about, it is entirely reasonable to suppose that one action against one cigarette company would have an effect on all of them, and that you would not have to

make a rule. You would do the same thing much faster bringing a single case; that would benefit the consumers.

So my job is deploying resources, and I would much prefer to bring a case, which can be done in a tenth of the time that making a rule can be done. I think that's a more effective way to deploy law enforcement resources for the benefit of the consumer.

Mr. FLORIO. If we get to the point in the—there's going to be a reauthorization here; there will be a reauthorization in the Senate—if we duplicate what happened last session of Congress, that they have an exemption and we do not, how locked in concrete are you on this question of the exemption?

Clearly in the last session of Congress, you came down on the Senate side, and nothing happened. If you came down on our side on saying you should continue, and that promised the hope of having a reauthorization, is that anything we could conceivably receive from you?

Mr. OLIVER. I would expect so, although I would have to confer with my four colleagues, you understand.

Mr. FLORIO. Thank you very much.

Mr. LUKEN. The gentleman from Tennessee.

Mr. COOPER. Thank you, Mr. Chairman.

Mr. OLIVER. I would like to suggest first that you perhaps amend your written statement. You start off with the words, "I am happy to be here today." From your attitude and your brief statement earlier, I would suggest you edit that to be, "I am unhappy to be here today." And to be honest with you, I can't say that I blame you.

I have a couple of specific questions and then some more general ones.

Are you really looking at your budget so closely that other $200,000 items are being examined and cut, and if so, what are some of those items?

Mr. OLIVER. We look at the budget carefully all the time. If we find $200,000 that we think is not being deployed usefully, we would certainly make an attempt to switch it.

This is a case that has—the cigarette lab has been on the mind of the commission, I gather, for awhile. It has not felt that those dollar have been spent usefully, and whenever you do find dollars that aren't being spent usefully, it seem to me you should spend them more usefully.

Mr. COOPER. Can you think of any other examples right now of miniature expenditures like that that have been selectively cut out and eliminated by the commission.

Mr. OLIVER. Not offhand. I have not gone through the budget this week. But I'd be happy to respond to that.

Mr. COOPER. Well. I'd like that for the record.

Are you planning, then, to lower your budget request by $200,000 when we do get around to an authorization hearing?

Mr. OLIVER. We had not planned to lower the budget request by $200,000, but if you would like us to lower it by $200,000, I'd be happy to take that under consideration.

Mr. COOPER. Well, if you were not planning on lowering your request, how are you planning on spending the $200,000?

Mr. OLIVER. We will redeploy the funds in other law enforcement activity.

Mr. COOPER. That means you'll think of a way?

Mr. OLIVER. That will be added to the other law enforcement activities that the commission engages in, yes, unless you'd like to cut out the $200,000.

Mr. COOPER. Well, I might take you up on that.

Mr. OLIVER. Fine.

Mr. COOPER. How about cost of getting the work contracted out?

Mr. OLIVER. We estimate there will be some cost in monitoring the activities of the industry, as Mr. MacLeod has described, and I think our current estimate is something like $30,000 or $40,000 in order to get the kind of contracting we would need.

Mr. COOPER. This is for one study during a year, or is this for—

Mr. OLIVER. No. This would be for the annual activities. Maybe Mr. MacLeod would care to respond.

Mr. MACLEOD. Certainly. We have anticipated that we could spend somewhere in the nature of $40,000 in a year. These are not hard estimates, of course, because a lot would depend on what we found in the course of monitoring. In the Barclay case, we spent over $100,000 once we went into litigation in getting the information that we needed to make sure those ads were accurate.

But in the normal course of monitoring, we have allocated or we expect that we would have to have part-time of an attorney and occasional time of a chemist or an expert who would be able to go to other laboratories and see what is going on, and then occasional testing of cigarettes ourselves at a laboratory that we choose in order to make sure that we generate competitive information.

Mr. COOPER. Have you gotten a price quotation from any particular laboratory?

Mr. MACLEOD. Yes, we have some price quotations. The prices range from $3,000 to $9,000 per brand, depending on how many brands we test, and those prices generally are prices that we negotiate, and we use competition in that sector, too. We try to find where we can get the best testing for the best price.

Mr. COOPER. This Oak Ridge backup facility you've been describing, not your facility, but some other facility at Oak Ridge National Labs—and I should warn you, I am from Tennessee; that's not in my district—who pays for that facility at Oak Ridge National Labs?

Mr. MACLEOD. That is a facility that is under the budget of the Department of Energy. It is actually operated by private contractors to the Department of Energy, and it is available for the use of Government agencies that wish to use it.

Mr. COOPER. Why do they have smoking testing machines that are better than yours, or at least a machine?

Mr. MACLEOD. They have machines in which they have been able to spend money and improve the equipment that we have not been able to do.

I should emphasize that we do not question the accuracy of our machine vis-a-vis their machine. Their machine is more automated, has better computers, et cetera.

Mr. COOPER. Does DOE have jurisdiction over tobacco.

Mr. MACLEOD. Not that I'm aware of, no.

Mr. COOPER. How did they get a machine that's more automated and better at testing tobacco than your machines?

Mr. MACLEOD. These machines can test the substance—these machines have many components that test for many different constituents of smoke and chemicals, and I would be glad to provide for the record a historical account of how that Oak Ridge Laboratory ended up with a machine at that location. I don't have the precise history right now.

Mr. LUKEN. Would the gentleman yield?

Mr. COOPER. Yes, I'd be happy to yield.

Mr. LUKEN. Since you're not under any time constraint, I don't apologize for interjecting.

What I'd like to do, since I think other Members are also curious about that is suggest to the gentleman that he pursue this line of questioning. I think we would all like to know, among other things, what would be—since this facility is available, what would be the opportunity for the Federal Trade Commission to use it as a substitute laboratory.

Mr. COOPER. That's just my thinking. And it seems curious to me that of all the towns in the United States, that one particular town, a small town in one State, would have two of the best smoking testing machines in the country, one operated by one Government agency and the other operated by another that has no jurisdiction over tobacco.

Mr. MACLEOD. Well, cigarette testing equipment at the Oak Ridge Laboratory, I understand, was established to do contract work for the National Cancer Institute, and part of the explanation, I think, has to do with the reason why we believe the FTC is not as appropriate a place for this kind of work, because this is scientific work, and there is a great deal of synergy that scientists can take advantage of when they have these kinds of functions that they can share among other functions that they have.

Mr. COOPER. Does the Surgeon General of the United States share your opinion that you're not supposed to be in this line of testing?

Mr. MACLEOD. We have contacted, among the Government Agencies and health Agencies before we made the decision, individuals at the Surgeon General's office, and they have not raised any objection to our decision here.

I also do want to address the question that you put: Would we want to replace our testing with full-scale testing at the Oak Ridge facility? The answer to that, I think, is no; because the cost advantage of the Oak Ridge facility is a cost advantage that we can obtain by virtue of occasional contracts when we do want to test as a backup method.

If we were to use those kinds of contracts for regular periodic testing of many brands, the contract costs would probably exceed the cost that we had spent on the lab.

Mr. COOPER. I hope both of you gentlemen still have your current jobs when the figures come in. It would be interesting to see how the contract costs end up comparing with the costs of your current facility.

Are you aware of the foreign pesticide problem on tobacco?

Mr. OLIVER. Are you suggesting it will be higher or lower? I didn't understand your comment

Mr. COOPER. Well, I don't know what the answer will be. I just hope that you have your current position, so that when the figures do come in, you can either be congratulated for your business judgment or perhaps criticized, if the contract cost is in excess of your annual operating cost.

Mr. OLIVER. That would depend on how much you contracted out, obviously.

Mr. COOPER. Yes. Are either of you gentlemen aware of the foreign pesticide problem on imported tobacco?

Mr. MACLEOD. I have heard reports relating to the issue. We are not—it is not a matter that has been put to the commission specifically.

Mr. COOPER. I think it's really outside of your jurisdiction. It just seems that if there's a laboratory there with expertise in these matters, and there is a current problem due to the unknown nature of substances sprayed on tobacco leaves which we import from other countries, and about—what—one-third of our current cigarettes are composed of imported tobacco, that someone should be looking into this. And as I understand it, it is properly within the Department of Agriculture's jurisdiction.

But before you close down your facility, turn out the lights or tear it down, I would urge you to at least check with the Department of Agriculture to see if they have use for your type of facility before it's entirely dismantled, because it is an area tangential to your direct concerns, but still important to public health and safety, at least until we get final answers.

On the main question of the hearing today, it seems to me, here we have what's really a piddling expenditure in the big scheme of things—and while we all agree that saving every dollar is important—we have a piddling expenditure, and it's singled out, and the answer we're given is, "Oh, you can trust the tobacco companies," in particular in their furnishing of scientific information. And Mr. Oliver has already supplied us a single instance in which one company tattled on another, and I hope that's representative of industry practice.

But most oligopolies have a tendency, according to economic theory, which Mr. Oliver seems to delight in so much, most oligopolies have a tendency to collude.

And if you're talking about the specific area of scientific information, Mr. Oliver, would you say that the tobacco companies have competed against each other in supplying reliable, overall scientific information to the American public on the health dangers of smoking cigarettes? Have they competed against each other to be more accurate, more perceptive, more ahead of the curve, in supplying up-to-date, fair, accurate scientific knowledge to the American people?

Mr. OLIVER. When cigarette companies first started advertising their health claims back in the 1950's, they started making claims about their cigarettes, that they were essentially healthier than other brands, they were told by the Federal Trade Commission that they couldn't make those claims, because the commission concluded at that time, the Government concluded, that they were impliedly saying that cigarettes were, in fact, safe and healthy. So cigarette companies

which had been making health claims up until that time were dissuaded by the government from making any health claims.

So I think that to the extent they don't make health claims, it was the government that stopped them from doing that.

Mr. COOPER. Let's look at more recent times. Are you aware of any reputable scientific body in the United States which agrees with most tobacco companies' current health claims about the relative health or safety of their products?

Mr. OLIVER. I beg your pardon. Am I aware of what?

Mr. COOPER. Are you aware of any reputable scientific group in the United States that agrees with the health claims of current tobacco companies in this country?

I'm not talking here about specific tar and nicotine levels. I'm talking about the full-page ads that we've seen in various newspapers and other things that have come out of the tobacco community?

Mr. MACLEOD. Mr. Cooper, if I may, I would like to explain that the chairman has some difficulty answering a question like this, because he is currently sitting on the commission which has before it a matter in adjudication involving an advertisement that contains some health claims, so it is very difficult for the chairman to make a comment because of the possibility that it could indicate some kind of attitude or prejudgment of the merits.

Mr. COOPER. That's fair. I was not aware you were in current litigation.

But in general, I think that's the source of this committee's skepticism, that if you're having to litigate or take into adjudication some sort of a scientific claim on the part of a tobacco company, it doesn't exactly give us the fullest confidence that we can trust the companies.

We would like a watchdog, and we're worried when a piddling expenditure like this is denied. Perhaps your agency wasn't up to snuff. That's an argument to bolster it, though, not to eliminate it.

Mr. OLIVER. Except as we've indicated, we don't test—indeed, the Government does not do its own testing in regard to a variety of products and standards. The R-value rule, the appliance energy labelings standards, we don't measure the energy efficiency of appliances. We rely to some extent on competition, and we always have the option, as we've tried to indicate here, of contracting out spot tests at Oak Ridge and that just strikes me as a much more cost-effective way to monitor the industry.

Mr. COOPER. I would urge you to talk to the Surgeon General, because he, at least, doesn't view this as any regular sort of product. He views this as a major, if not the major, health threat that our country faces, aside from AIDS and a few other things like that, I suppose.

Finally, if I could ask this question, let's go along with your free market theory and let's have competition and let's assume that everybody is going to vigorously compete against each other in all ways—

Mr. OLIVER. Let's not make it too theoretical, after we've seen what happened to airlines after the free market took over.

Mr. COOPER. Well, let's concede the ideal question—great competition is functioning out there—should there be a bad actor in the field, would you favor a stiff penalty, perhaps, if one of the tobacco companies is found to have lied about its tar and nicotine content?

Mr. OLIVER. Yes, we'd bring an action against them, the way we do against any industry practice.

Mr. COOPER. What sort of penalty is assessed in a case like that? Is it a traffic violation type penalty, or is it one that

would really make a large, diversified company sit up and take notice?

Mr. OLIVER. Well, there are civil fines for noncompliances with rules and orders, and we try to make them—

Mr. COOPER. In what amount?

Mr. OLIVER. It would depend on the company and the circumstances. I don't think I could answer that here. But we try to make them sufficient to discourage the activity in the future.

Mr. COOPER. I have no further questions, Mr. Chairman.

Mr. LUKEN. The gentleman from Iowa, Mr. Tauke.

Mr. TAUKE. Thank you, Mr. Chairman.

I'll be very brief. I have people waiting in my office, but I wanted to make a couple of points.

First, could you provide to the subcommittee a listing of those laboratories which would be available that could provide the services that are currently provided, or were being provided by your own laboratory?

Mr. OLIVER. Yes, I'd be happy to do that.

Mr. TAUKE. Can you tell us how many that might be? Are there two, three, six, a dozen out there?

Mr. MACLEOD. I think that we've identified in the letter that we have submitted to the committee already four laboratories, five counting TITL, and I suspect that we could find more if we looked. There is also—as the chairman indicated, we will be glad to give a more detailed listing of locations and capabilities.

Mr. TAUKE. I appreciate that.

Mr. LUKEN. Without objection, the record will be held open for that.

Mr. TAUKE. Thank you, Mr. Chairman.

FEDERAL TRADE COMMISSION

CIGARETTE TESTING

Tar and Nicotine Content Results

The latest results of cigarette testing were published in the FEDERAL REGISTER on Monday, December 13, 1974, 41 FR 54221. Results of retesting of reformulated Parliament brand of cigarettes were published in the FEDERAL REGISTER on Friday, April 15, 1977, 42 FR 19225.

As a result of a request from Lorillard, the manufacturer of Kent Golden Lights Cigarettes, the Federal Trade Commission authorized its Tobacco Research Laboratory to conduct two retests of Kent Golden Lights: First, by inserting the cigarettes to the standard depth of 11 mm. into the cigarette holders of a cigarette smoking machine, and second, by inserting the cigarettes to a depth of 5 mm. At this time, the FTC rejects the results of the 5 mm. test as inappropriate in measuring tar and nicotine levels. The results by the standard 11 mm. method used by the Tobacco Research Laboratory were as follows:

[In milligrams per cigarette]

	TPM dry	Nicotine
Kent Golden Lights, king size, filter, soft pack	8	0.6

In testing cigarettes the FTC's Tobacco Research Laboratory routinely inserts 7/16" (11 mm.) into the cigarette holders on its cigarette smoking machine. Recent developments in ventilated filtration systems have raised the question of whether and to what extent of the depth of insertion should vary from the 11 mm. standard. An 11 mm. insertion would affect a ventilated filtration system that utilized that portion of the cigarette within 11 mm. of the tip, and therefore the "tar" and nicotine figures. Of special concern when considering any such modification of the standard 11 mm. insertion is

whether the insertion depth would and should be decreased beyond the point where consumers cover the cigarette with their lips, fingers, or both when they puff. The Commission believes that additional information is necessary before deciding whether further action should be taken in connection with this matter.

By direction of the Commission dated April 11, 1977.

JOHN P. DUGAN.
Acting Secretary.

* * *

FEDERAL REGISTER

Wednesday, April 13, 1983

* * *

FEDERAL TRADE COMMISSION

Commission Determination Re Barclay Cigarettes; Amendment of Report of "Tar," Nicotine, and Carbon Monoxide Content of 208 Varieties of Cigarettes; Request for Comment on Possible Testing Modifications

Agency: Federal Trade Commission

Action: Announcement of Commission Determination, Amendment of Past Report, and Request for Comment on Possible Testing Modifications.

SUMMARY: This document announces the Commission's determination that the present FTC testing methodology does not assess accurately Barclay cigarettes and requests comment on possible testing modifications. In accordance with this determination the Commission is amending its March, 1983 *Report of "Tar," Nicotine and Carbon Monoxide of the Smoke of 208 Varieties of Cigarettes*, 48 FR 13268 (March 30, 1983).

ADDRESS: Comments should be filed in Room 130, Federal Trade Commission, 6th & Pennsylvania Avenue, N.W., Washington, D.C. 20580, no later than June 30, 1983.

FOR FURTHER INFORMATION CONTACT: Judith P. Wilkenfeld, Federal Trade Commission, Bureau of Consumer Protection, (202) 724-1499, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: In June, 1981 the Federal Trade Commission initiated an inquiry to examine allegations that its current "tar," nicotine, and carbon monoxide testing methodology, with the specifications as set forth in the Commission's announcements of July 31, 1967, 32 FR

11178, and January 18, 1979, 44 FR 3777, does not assess accurately Barclay cigarettes.

The Commission's inquiry has been assisted by extensive comments and scientific studies submitted by Lorillard, R.J. Reynolds, and Philip Morris, as well as Brown and Williamson, the manufacturer of Barclay cigarettes. The Commission also utilized three independent consultants to review the information submitted by these companies and make recommendations to the Commission and its staff. The consultants' reports were subsequently circulated to the companies for further comment.

Based on the information developed during the inquiry, the Commission has determined that its present testing methodology for "tar," nicotine, and carbon monoxide does not measure accurately Barclay cigarettes. The Commission has therefore determined it will not accept test results based on the current FTC method as substantiation for claims made about the "tar," nicotine, and carbon monoxide content of all varieties of Barclay cigarettes.

Without a new testing methodology, precise statements as to the appropriate "tar", nicotine, and carbon monoxide rankings for Barclay cigarettes are not possible: Independent estimates by the Commission's consultants for Barclay 80's and 85's, which are ranked by the present method as 1 mg. "tar" cigarettes, range from 3 to 7 mg. "tar." Similarly, the relative delivery of nicotine and carbon monoxide of these products is greater than suggested by the present FTC tests.

The Commission is therefore amending its March, 1983, *Report of "Tar," Nicotine and Carbon Monoxide of the Smoke of 208 Varieties of Cigarettes*, 48 FR 13268, by appending copies of this Notice to the Report. By this action, the Commission does not mean to imply that Brown and Williamson, the manufacturer of Barclay cigarettes, has violated any provision of the Federal Trade Commission Act for its past use and reliance on the FTC method to assess "tar",

nicotine, and carbon monoxide levels. Unless and until the Commission adopts a new testing methodology that is able to measure Barclay cigarettes accurately, however, future reports will not include test results for these cigarettes.

The Commission has further determined that there is a significant likelihood that the current testing method does not assess accurately Brown and Williamson's Kool Ultra and Kool Ultra 100's each of which uses the Actron filter design used in Barclay cigarettes. The Commission is today requesting comment on the following limited issues: (1) Are Kool Ultra and Kool Ultra 100's assessed accurately by the current FTC method? (2) If not how should these products be assessed?

The Commission wishes to reiterate that its "tar", nicotine, and carbon monoxide data are for comparative purposes only. How much "tar", nicotine, and carbon monoxide a particular cigarette delivers depends on the way it is smoked. "Tar", nicotine, and carbon monoxide delivery per cigarette will increase if the cigarette is inhaled more deeply, or puffed more frequently, by the smoker. If consumers who switch to lower yield cigarettes change their smoking pattern, for example, by smoking more cigarettes per day, they may receive a greater yield than suggested by the FTC test results.

All ventilated filter cigarettes pose a special problem. Many "lower tar" cigarettes achieve lower yields in part by use of a ventilated filter. Perforated holes or vents on the filter allow air to mix with the smoke during puffing, thus diluting the smoke and decreasing the yield. If the holes or vents are blocked, however, delivery will increase. Consumers will only achieve the relative "tar", nicotine, and carbon monoxide yields suggested by FTC tests for ventilated filter cigarettes if they avoid blocking the holes or vents on the filter with their lips or fingers while smoking the cigarettes.

If consumers avoid blocking ventilation holes, cigarettes smoked in the same fashion will yield "tar", nicotine, and

carbon monoxide in general accordance with their relative FTC rankings. The Barclay filter, however, poses a unique problem. Reduced ventilation when smoking Barclay apparently occurs inevitably and cannot be avoided by informed consumers except by use of a cigarette holder. Therefore, the Commission is taking this action to correct the "tar", nicotine, and carbon monoxide figures for Barclay cigarettes previously disclosed in the FTC's 1983 Report.

Based on the evidence obtained in this inquiry, the Commission decided in June 1982 to solicit comments on proposals to modify its testing machine so that the relative yields of all cigarettes, including Barclay, may be assessed accurately. The Commission prepared a statement that shows how it determined that it needed to explore possible testing modifications. The Commission's statement and the underlying evidence are now under seal by a court order. Several members of the cigarette industry who participated in the investigation had access to the evidence prior to the imposition of the seal. The statement and the evidence, if available, would be helpful to those parties who did not participate in the investigation in preparing informed comment in response to this notice. The Commission does not know whether or when the court order sealing the evidence will be lifted. Therefore, to avoid further delay, the Commission has decided to seek public comment now rather than waiting to see if the seal will be lifted.

The Commission is seeking comments on each of the following proposed holders for its testing machine:

(A) The MK 11 "Filtrona" holder, manufactured by Cigarette Components Ltd. of London and sold in the United States by American Filtrona Corp., Richmond, Virginia. This holder increases the pressure on the filter, thereby reducing air flow through the channels on the Barclay-type filter.

(B) A modified version of the Cambridge holder currently used on the machine, containing a ring of foam rubber

so as to abut the mouth end of the cigarette and block the exit channels on the Barclay-type filter.

(C) A cigarette holder designed so that one or more of the ventilation channels on the Barclay filter are blocked.

Each of these holders is intended to simulate the reduction in ventilation that occurs when humans smoke Barclay. The Commission has not yet determined whether any of these modifications are technically feasible and practicable, or whether some other modification will insure that all cigarettes, including Barclay can be ranked accurately.

The Commission also is requesting comments on the following specific questions and any other issues relevant to possible modifications of its testing methodology given the Commission's determinations regarding Barclay:

(1) Which of the proposed modifications, or what other modification, would yield the most appropriate test results for all cigarettes, given the Commission's finding in this matter and the consultants' estimates of Barclay's tar delivery?

(2) How quickly and easily, and at what cost, could the Commission implement each of the proposed modifications, or any other proposed modifications?

(3) Regarding proposal (C), which would more appropriately rank Barclay cigarettes—for example, a holder blocking two channels or one blocking three channels?

(4) Does the current FTC method accurately assess the relative "tar," nicotine, and carbon monoxide of Kool Ultra and Kool Ultra 100's each of which utilizes the Actron filter utilized in Barclay? If not, how should these products be assessed?

(5) Given the Commission's findings, what action other than modification of the testing methodology, if any, is appropriate?

(6) Would there be unintended consequences from modifying the cigarette testing method and/or machine? What effect might modification have upon possible innovation in the cigarette design?

(7) Should the Commission further examine the implications for its testing program of the issues raised by compensatory smoking behavior, including hole blocking, when consumers smoke lower "tar" cigarettes? What is the evidence that smokers use higher "tar" cigarettes differently than lower "tar" cigarettes? What is the evidence regarding the extent of hold blocking by smokers of different ventilated filter cigarettes? How does behaviorally reduced air dilution affect the relative rankings of various brands? Are there problems regarding compensatory smoking behavior which are significant enough to warrant further exploration of changes in the method, beyond those necessitated by the Commission's findings concerning Barclay? What lines of inquiry would generate the most useful information if such an examination is undertaken? For example, should the Commission explore a system of categories or "bands" of "tar" content rather than specific numerical estimates? Also, should consumers be advised that the cigarettes' actual "tar" delivery depends on how it is smoked?

In addition to responses to these questions, the Commission will carefully consider any additional research, such as studies of blood cotinine in smokers and air dilution in ventilated filter cigarettes, or other relevant information bearing on the appropriate relative rankings of these products.

By direction of the Commission.

Benjamin I. Berman,

Acting Secretary.

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FEDERAL TRADE COMMISSION

[16 CFR Part 428]

[35 Fed. Reg. 12671 (Aug. 8, 1970)]

ADVERTISING OF CIGARETTES

Notice of Public Hearing and Opportunity To Submit Data, Views, or Arguments Regarding Proposed Trade Regulation Rule

Notice is hereby given that the Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, et seq., and the provisions of Part 1, Subpart B of the Commission's procedures and rules of practice, 16 CFR 1.11, et seq., has initiated a proceeding for the promulgation of a Trade Regulation Rule regarding the advertising of cigarettes.

Accordingly, the Commission publishes this notice and proposes the following Trade Regulation Rule:

§ 428.1 The Rule.

In connection with the sale, offering for sale, or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to fail to disclose, clearly and prominently, in all advertising the tar and nicotine content of the advertised variety or varieties in milligrams of tar (to the nearest whole milligram) and nicotine (to the nearest one-tenth milligram) per cigarette, based on the most recently published Federal Trade Commission test results.

The testing methodology currently used by the Federal Trade Commission is the Cambridge Filter Method specified in the FEDERAL REGISTER notice of November 4, 1966 (31 F.R. 14278), as described in an article entitled "Determina-

tion of Particulate Matter and Alkaloids (as Nicotine) in Cigarette Smoke," by C. L. Ogg, Journal of the Association of Official Agricultural Chemists, Vol. 47, No. 2, 1964, and as modified by the Federal Trade Commission in accordance with the FEDERAL REGISTER notice of August 1, 1967 (32 P.R. 11178).

Where a finally adopted Trade Regulation Rule is relevant to any issue involved in any adjudicative proceeding thereafter instituted, the Commission may rely upon the Rule to resolve the issue: *Provided*, That the respondent shall have been given opportunity for a fair hearing on the applicability of the Rule to the particular case.

All interested persons, including the consuming public, are hereby notified that they may file written data, views or arguments concerning the proposed Rule with the Assistant Director for Food and Drug Advertising, Bureau of Consumer Protection, Federal Trade Commission, Pennsylvania Avenue and Sixth Street NW., Washington, D.C. 20580, not later than October 8, 1970. To the extent practicable, persons wishing to file written presentations in excess of two pages should submit 20 copies.

All interested persons are also given notice of opportunity to make oral presentations of data, views, or arguments with respect to the proposed Rule at a public hearing to be held at 10 a.m. e.d.t., on Thursday, October 15, 1970, in Room 532 of the Federal Trade Commission Building, Washington, D.C.

Any person desiring to present his views orally at the hearing should so inform the Assistant Director for Food and Drug Advertising, Bureau of Consumer Protection not later than October 8, 1970, and state the estimated time required for his oral presentation. Reasonable limitations upon the length of time allotted to any person may be imposed. In addition, all parties desiring to deliver a prepared statement at the hearing should file such statement with the Assistant

Director for Food and Drug Advertising, Bureau of Consumer Protection, on or before October 8, 1970.

The data, views, or arguments presented with respect to the proposed Rule will be available for examination by interested parties at the office of the Assistant Secretary for Legal and Public Records, Federal Trade Commission, Washington, D.C., and will be considered by the Commission in the establishment of a Trade Regulation Rule.

All interested persons, including the consuming public, are urged to express their approval or disapproval of the proposed Rule, or to recommend revisions thereof, and to give a full statement of their views in connection there-with.

Issued: August 8, 1970.

By the Commission.

[SEAL] JOSEPH W. SHEA,
Secretary.

[F.R. Doc. 70-10357; Filed, Aug. 7, 1970; 8:47 a.m.]

NOMINATION — 1970

HEARING
BEFORE THE
COMMITTEE ON COMMERCE
UNITED STATES SENATE

NINETY-FIRST CONGRESS

SECOND SESSION

ON

NOMINATION OF

MILES W. KIRKPATRICK TO BE CHAIRMAN OF THE
FEDERAL TRADE COMMISSION

August 20, 1970

Serial No. 91-88

* * *

Senator MOSS. You are aware of course that consumers are showing an increased interest and in fact demanding their rights to participate in the regulatory process by which we are supposed to protect the environment and the quality of the marketplace and the old rules appear to no longer be in effect. We are concerned that the FTC as the major agency of consumer protection at the Federal level be fully responsive to the burgeoning insistence that the marketplace be improved. In that connection do you believe the FTC rules of practice should be amended to assure interested parties the right to participate in FTC proceedings?

Mr. KIRKPATRICK. I assume without knowing the answer that we already have procedures which permit intervention of interested parties. And I assume also the procedures

would permit the appearance, the filing of briefs and the like. This is a complicated question with which the Commission has dealt in some detail in recent cases. I am not familiar with the detail of the matters and really cannot comment further than that at this time.

Senator MOSS. The designation of the Bureau of Deceptive Practices has been changed to the Bureau of Consumer Protection. Other than the establishment of a Consumer Advisory Board and consumer protection committees in the field and the creation of a Consumer Education Office, what new steps have been taken in consumer protection?

Mr. KIRKPATRICK. We have, as I understand it, a few groups of consumer representatives, I don't know that that is the exact title, that have been coming from the field offices, who have been taking training, if you like, and then going back to the field offices. That has been done, sir.

I think these consumer advisory and consumer protection committees are a great step forward. I think they will be the eyes and ears of the Commission in the matter of consumer protection, to develop what must be developed in this field.

May I say there is a great deal of talk and I am aware of that, about consumer protection. But there is to the best of my knowledge very little solid economic learning in this field. I would hope that these consumer protection agencies in the field and the consumer advisory groups, would develop a body of learning.

May I give you a further example?

I understand that the computerized program that the Commission established in Chicago has developed this interesting fact, that the most frequent complaint that has come to that consumer protection group, is the failure to deliver goods upon an order of a consumer. That is a surprising fact. I would not have expected that. But that is the kind of thing I

hope we develop, the kind of information, which is very important in this field.

Senator MOSS. Do you intend to make increased use of public hearings and trade regulation rules?

Mr. KIRKPATRICK. We intend to—it would certainly be my intention to do so.

Senator MOSS. We covered that part earlier.

Senator MOSS. Thank you very much, Mr. Kirkpatrick. I appreciate your answers.

As you can see, we have many things about which we have great concern, and on which we must turn to the Trade Commission for effective enforcement. We are anxious that you vigorously pursue these consumer areas that we have been talking about in this series of questions.

Thank you very much.

Mr. KIRKPATRICK. Thank you, sir.

The CHAIRMAN. Thank you, Mr. Chairman.

Mr. KIRKPATRICK, I have just one other question that was brought up on the cigarette bill. There is a new proposed rule of the Trade Commission to require tar and nicotine listing in the advertising of cigarettes. As you know, we have been working with the tobacco industry for a long time, and I must say there has been good cooperation with the industry, seeking a voluntary agreement by them to do just what the Trade Commission is suggesting in the proposed rulemaking.

Mr. KIRKPATRICK. Yes, sir.

The CHAIRMAN. I wanted to ask you if this can be done by voluntary agreement, without the need of long, drawn out litigation or further legislation, would that be better than the rule?

Mr. KIRKPATRICK. In my judgment; yes, sir.

The CHAIRMAN. I hope that that can be pursued, because I must say they have been very cooperative and I think we might work out something along that line. We did that a long time ago in advertising with the hard liquor people. And for years it has been just an agreement between us and them that they don't go on television. And it has worked. And we have a sort of a loose agreement with the beer people that they don't drink beer on television.

Now if you stopped a man on the street and said, "Do you know that people don't drink beer on television?" He would say, "What do you mean? I just saw them drinking beer last night."

Mr. KIRKPATRICK. That is my impression.

The CHAIRMAN. Because the advertising gets right up to it. But it seems to me if there could be achieved a voluntary agreement on this tar and nicotine, which this committee has long pursued, or at least we have been talking about it, that that might be the better arrangement.

Mr. KIRKPATRICK. It would be a highly desirable arrangement, sir; indeed, yes.

The CHAIRMAN. All right.

Senator HART

Senator HART: I will yield to the Senator from Kentucky.

Senator COOK. May I say to the Senator and the chairman, after Senator Moss and the chairman get through with tobacco and whisky, there is not much left of the Commonwealth of Kentucky.

The CHAIRMAN. Well, there are a few things left, but we won't mention them today.

Senator COOK. For Senator Magnuson's benefit, we are getting a group of people to be anti-SST in the Commonwealth of Kentucky.

Mr. Kirkpatrick, to be serious, I would hope from the start of questioning that your nomination wouldn't depend on your overall enthusiasm of S. 3201. As you well know I have strong objections to this bill and purely and simply because I believe that the Congress is about to extend to the Federal Trade Commission authority that it has to and should reserve to itself.

Let me ask you this: I was delighted to hear you say if the adjudicatory authority of the Commission were not in existence, probably you would not be sitting here. I think this is fine. But you do agree there is a limit beyond which the adjudicatory authority of an agency should go before the Federal court system assumes its responsibility; do you not?

Mr. KIRKPATRICK. Well, there must be some limit, sir, yes. Exactly what you have in mind, of course I don't know. I don't mean to fence with you, but, yes.

Senator COOK. What I have in mind is at least my own legal interpretation of rule 23 of the Rules of Civil Procedure, in relation to S. 3201 and the authority that is to be vested in the Federal Trade Commission by this bill. And I merely had this in mind. I hope I will be able to expound on it at a later time.

The CHAIRMAN. Would the Senator yield a moment there? I must be excused, and I think Senator Cotton has to leave too.

Senator COTTON. Before leaving, I will say I didn't go into these matters, because I knew Senator Cook was going into them. However, I am very much interested in the questions I anticipate he will ask.

Senator COOK. I wonder whether you have read to any great extent section 201, subsection 1(p) of the present proposed act?

Mr. KIRKPATRICK. I have not studied it, I am aware of it.

Senator COOK. As a matter of fact, in light of the criticisms that have been leveled against the FTC and as a matter of fact some of which are contained in your report, don't you think Congress should retain the power to define those unfair acts which may become a legal cause of action in a Federal district court? Or do you think that broad, all-expansive power should be delegated to the Federal Trade Commission?

Mr. KIRKPATRICK. I think in fairness, Senator, I have not come to grips with that in any way that permits me to give you an answer which is categorical. I do, however, appreciate the force of that which you are saying, and the force of your statement in the report and, indeed, it disturbs me.

On the other hand, I have not had the benefit of any thinking on the matter, any conferring with my colleagues or others. I would prefer to simply leave it that I recognize very much of the force of your remarks but I have not myself made up fully my mind.

Senator COOK. There is another question I have to ask you and I am sure your answer will be satisfactory in the record, but I hope that in this business of cigarette advertising, that you would not have any preconceived ideas or that you would not have any strong objectivity in regard to the attitude of some of the members of this committee.

Let me tell you why. During our discussions relative to the act that was passed in the spring, we had a hearing with the radio and television people and it was their desire, and I am sure this is public knowledge, it was their desire that they wished to be phased out in 3 years. It was the desire of this Senator that the advertising go off last September. It was their desire that they be phased out in 3 years because this represented 12½ to 14 percent of their entire income and they could not sustain such a loss.

I might even say to you part of the argument that made up the decision to go until after the bowl games of January 1

of next year, for their benefit, by many of the people on the committee who were

* * *

Federal Trade Commission

NEWS

WASHINGTON, D.C. 20580

For further information call:
David H. Boswell
Office of Public Information
(202) 962-7144

FOR RELEASE After 8:30 A.M., Thursday, October 1, 1970

FTC DIRECTS TOBACCO INDUSTRY TO SUBMIT SPECIFICS ON DISCLOSING TAR AND NICOTINE CONTENT

The Federal Trade Commission has given cigarette manufacturers 30 days in which to tell the Commission exactly how they voluntarily intend to disclose tar and nicotine content in cigarette advertising. The FTC also postponed the October 15 hearings on its proposed trade regulation rule to require such disclosure.

The Commission, after considering the tobacco industry's plan, will set a new hearing date if it still feels a trade regulation rule would be in the public interest.

FTC Chairman Miles W. Kirkpatrick said: "The Commission's objective is to insure that all cigarette advertising make these tar and nicotine disclosures as soon as possible. If the industry can devise a voluntary plan that is feasible and appropriate the Commission is willing to consider it. A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately."

The written submissions by the industry will be placed on the public record for 30 days for public comment.

FEDERAL TRADE COMMISSION
NEWS

For further information call:
David R. Buswell
Office of Public Information
(202) 962-714

FOR RELEASE Immediate Wednesday, December 23, 1970

FTC SUSPENDS PROCEEDING TO REQUIRE DISCLOSURE OF TAR AND NICOTINE CONTENT IN CIGARETTE ADVERTISING AFTER INDUSTRY AMENDS VOLUNTARY PLAN

On October 23, 1970, eight major members of the tobacco Industry submitted to the Commission a voluntary plan for the disclosure of tar and nicotine content in cigarette advertising. The Commission announced its receipt of the voluntary plan, placed it on the public record, postponed the scheduled public hearing on a proposed trade regulation rule covering the same subject and published notice of the foregoing in the Federal Register. Fifteen comments were received from the public.

Following discussions between representatives of the industry and the Commission's General Counsel, the voluntary plan was amended by the industry members in several respects favorable to the public interest.

After considering the public comments and the tobacco industry's amended plan, the Commission has determined to suspend indefinitely the proceeding for a trade regulation rule covering disclosure of tar and nicotine content in cigarette advertising. It appears to be in the public interest to afford the tobacco industry an opportunity to implement the letter and the spirit of the amended plan which it has proposed. In taking this action the Commission is retaining the unconditional right to reschedule the trade regulation rule proceedings and to take any other action relating to this sub-

ject at any time it deems such action to be necessary or desirable in the public interest.

The Commission believes that if the amended plan operates satisfactorily, the public will, at the earliest possible time, be informed of the tar and nicotine content of cigarettes. In addition, the Commission will be able to employ substantial manpower and funds which would otherwise have been devoted to hearings and court proceedings to dealing with the serious problems relating to cigarette advertising.

UNITED STATES GOVERNMENT

MEMORANDUM

Date: Nov. 9, 1970

FEDERAL TRADE COMMISSION
RECEIVED
NOV 12 1970
SECRETARY

TO : Commission.

FROM : Allen F. Brauninger, Attorney,
Division of Food & Drug Advertising,
Bureau of Consumer Protection.

SUBJECT: Industry Proposal for Disclosure of Tar and Nicotine Content in Cigarette Advertising—Rejection Recommended.

Pursuant to the Commission "minute" dated October 27, 1970, the staff has examined carefully the proposal to disclose tar and nicotine content in cigarette advertising on a voluntary basis, and the memorandum supporting the proposal, submitted jointly by eight cigarette manufacturers on October 23, 1970. The staff recognizes the desirability of settling this matter in a voluntary fashion, if such settlement will protect the public interest involved in the matter. It is the opinion of the staff that this proposal is not adequate to protect the interests of cigarette consumers and the general public because:

(1) It fails to include point-of-sale display materials in the advertising covered by the proposal.

(2) It allows in some instances the use of tar and nicotine data from laboratories operated by the manufacturers.

(3) It contains a format for disclosing tar and nicotine content which would not convey clearly to the general public the date of the Commission test results to which reference is made.

(4) It lacks any enforcement mechanism.

Before discussing each of these deficiencies in detail, it should be noted that by "minute" dated September 16, 1970, the Commission directed the General Counsel, the Acting Assistant Director for Food & Drug Advertising, and the undersigned to meet with representatives of the Tobacco Institute, Inc. to explore the possibility of reaching an agreement with all cigarette manufacturers to disclose tar and nicotine content voluntarily in cigarette advertising. During the meetings which occurred pursuant to this "minute," representatives of the Tobacco Institute offered proposals generally similar to the one now presented to the Commission. At that time the Commission staff pointed out to the Tobacco Institute representatives objections of the same kind which will be discussed below. Therefore, it cannot be supposed that the deficiencies in the industry submission to the Commission are the result of inadvertent omissions, or that representatives of the cigarette industry have not had opportunity to consider the staff's objections.

1. Failure to Include Point-of-Sale Materials in Advertising Covered by the Proposal. The principal purpose of the proposed Trade Regulation Rule to require disclosure of tar and nicotine content in all cigarette advertising is to provide cigarette smokers with reliable information about the quantity of tar and nicotine produced by the smoke of the many varieties of cigarettes advertised in this country. The staff believes that this information is needed by cigarette smokers to prevent deception and to provide the basis for a more rational choice among the competing varieties. Point-of-sale materials (such as posters, counter displays, and calendars) are designed to catch the customer's eye and deliver a last-minute appeal to purchase the featured variety. The staff believes

that these materials should disclose the tar and nicotine content of the featured variety because they are highly visible to cigarette smokers and are placed at the ideal location to influence choice among competing varieties.

At the risk of laboring an obvious point, the text of the proposed Trade Regulation Rule requires disclosure of tar and nicotine content Regulation "in all advertising"; the proposal offered by the cigarette manufacturers "in lieu of any formal Trade Regulation Rule proceeding" would disclose tar and nicotine content in "some" advertising.

The industry claims that point-of-sale materials are too inflexible and too trivial to be subject to the requirement that tar and nicotine content be disclosed. We disagree; we believe that it would be clearly in the public interest for all such material to disclose the most recent tar and nicotine figures with an indication of the date of such test.

Reports have been circulated in the advertising trade that after the ban of cigarette advertising from broadcasting media takes effect on January 2, 1971, the cigarette industry can be expected to place much greater emphasis on point-of-sale promotional materials than in the past. Only the manufacturers know definitely if this will be the case. In any event, the program submitted by the manufacturers leaves a "loophole" available for such emphasis in the future.

2. Use of Tar and Nicotine Data From Laboratories Iterated by the Manufacturers. The proposal submitted by the cigarette manufacturers would allow the manufacturers to use in advertising tar and nicotine data derived from tests conducted by the manufacturers' own laboratories, utilizing the testing methodology adopted by the Commission, in three instances:

a. When a manufacturer introduces a new variety onto the market, the manufacturer would be allowed to use tar and nicotine data derived from its own laboratory tests until that

variety was sampled, tested and included in the Commission's published test report of tar and nicotine.

b. If the Commission fails to include any variety in its published report of tar and nicotine content, the manufacturer would be allowed to use tar and nicotine data derived from its own tests until the Commission's published report includes that variety.

c. If a manufacturer determines that tar or nicotine content of any of its varieties differs more than twenty percent from the figures in the most recently published Commission report, submits samples of that variety for retesting by the Commission laboratory, and is not given the results of retesting by the Commission laboratory within thirty working days, the manufacturer would be allowed to use the data obtained from its own laboratory testing until the Commission laboratory made available to the manufacturer the results of its retesting.

Although the industry proposal specifies that the manufacturers' laboratories will use the methodology adopted by the Commission to determine tar and nicotine content, this methodology requires the use of sensitive instruments by skilled laboratory technicians who must make many careful measurements and several complex mathematical calculations to determine the tar and nicotine content of any given variety. The staff believes that those provisions in the manufacturers' proposal which would allow cigarette companies to use tar and nicotine data developed in their own testing laboratories are undesirable as a practical matter because the Commission has no evidence about the reliability of the testing laboratories of the various cigarette manufacturers. Additionally, those provisions which would allow use of the manufacturers' own tar and nicotine data in cigarette advertising, if accepted, would provide fuel to the argument advanced by some of the more vociferous critics of the Commission that the agency has an unhealthy familiarity with the industries that it is supposed to regulate. Regardless of the

merit of such arguments, the appearance of associations which give rise to such criticism should, in the staff's opinion, be studiously avoided.

During the meetings with representatives of the Tobacco Institute, the problem of new varieties was discussed extensively. The staff fully appreciates the industry's understandable desire to prevent disclosure of information about the identity of the manufacturer, brand name, physical characteristics, packaging, tar or nicotine content, or marketing plans for new varieties until such varieties are placed on the market. The staff believes that the Commission's laboratory should test any new variety before it is advertised. The staff advised the Tobacco Institute representatives that such testing by the Commission laboratory could be done in such fashion as to prevent unauthorized disclosure of any information about the manufacturer's identity, brand name, physical characteristics, etc., before the new variety is introduced onto the market.

The staff believes that if a manufacturer desired to advertise a new variety, the Commission laboratory could test samples of that variety, unidentified by trade name, supplied by the manufacturer from the production line, and inform the manufacturer of the tar and nicotine content. At the time the manufacturer desired to advertise that variety, the manufacturer could inform the Commission staff of the brand name to be assigned to the new variety and the Commission laboratory could publish the results of its testing as a supplement to its most recent report.

Essentially the same procedure could be followed if a variety were inadvertently overlooked in the regular market sampling and testing.

The staff recognizes that manufacturers can change the formulation and design of their varieties to alter tar and nicotine content. The staff also recognizes the desirability of encouraging manufacturers to market cigarettes with lower tar

and nicotine content. The manufacturers' proposal is drafted to allow manufacturers to submit samples of any variety for retesting when "any company determines that the 'tar' or nicotine values of any of its varieties have become larger or smaller than twenty percent of the most recently published Commission results." As stated earlier, under the terms of the manufacturers' proposal, if the Commission laboratory did not retest the varieties and give the manufacturer the results within thirty working days after receiving samples for retesting, the manufacturer would be allowed to use tar and nicotine data developed in its own laboratory until the Commission laboratory furnished its results to the manufacturer.

The staff believes that this proposal would allow manufacturers to flood the Commission laboratory with requests for retesting. The industry proposal does not require a manufacturer to state the way in which it determined that the tar or nicotine content of the variety in question is at variance with the figures listed in the Commission's report. A second apparent flaw with this part of the manufacturers' proposal is that, if retesting did establish that the tar or nicotine content of the variety in question had in fact been changed, no obligation is imposed on the manufacturer to withdraw all packages of the previous version of the reformulated variety from the market, or to alter the packaging of the reformulated variety so that consumers could distinguish the new version from the old.

The staff believes that, if a manufacturer reformulated a variety and packaged the new version so that it could be distinguished from the old, and informed the staff of this fact, adequate arrangements could be made to prevent intermixing samples of the two versions collected during the normal sampling procedure. The two versions could then be tested and reported separately during the regular testing cycle.

To summarize, the staff believes that for both practical and policy considerations, it would be highly undesirable to allow cigarette manufacturers to use tar and nicotine data in

advertising obtained from the manufacturers' own laboratories. The staff believes that the three problem areas discussed above can be resolved fairly to the manufacturers and to the public interest without accepting a proposal which would allow cigarette manufacturers to use tar and nicotine data developed in their own laboratories.

3. Format for Disclosing Tar and Nicotine Content. It is well known that the production and publication of any advertisement necessarily involves problems of scheduling and deadlines. Some media are more flexible than others, but at some point in the preparation of any advertisement, the text of the advertisement must be submitted in its final form and cannot thereafter be changed. It is also well known that some media, such as daily newspapers, require advertising copy in final form only a few days before publication; others, such as monthly magazines, require copy in final form several months before the periodical reaches subscribers and news stands. During the discussions in September, both the staff and the representatives of the Tobacco Institute devoted considerable attention to the problem "lead" time for advertising copy. All parties to the discussions could see that, in cases involving media with deadlines far in advance of distribution, an advertisement could be prepared with tar and nicotine data from the "most recently published Federal Trade Commission report," and submitted to a publisher to meet the established deadline for advertising copy, and that, in the interval between the publisher's deadline and the date of distribution, the Commission might release a new report of tar and nicotine content of cigarettes. To meet this problem, the staff suggested that the format for disclosing tar and nicotine indicate the date of the Commission report from which the tar and nicotine data was taken, as in the following example:

_____ mg. "tar," _____ mg. nicotine per cigarette.

Source: FTC Report of May 18, 1970.

The industry proposal would assign a number to each Commission report on tar and nicotine content of cigarettes[1/]), and would identify the report from which the tar and nicotine data used in any cigarette advertisement in the following manner:

_____ mg. "tar," _____ mg nicotine
av. per cigarette, FTC Report _____.

The staff believes that the industry's proposed format is unacceptable because it adds the unnecessary element of assigning a number to reports which would be more easily and meaningfully identifiable by the date of publication in the Federal Register. (Publication of the reports in the Federal Register is a change to existing practice proposed by the manufacturers to which the staff makes no objection.) The staff believes that reference to a report number in the disclosure of tar and nicotine content would only serve to conceal the date of the Commission report and create confusion in the minds of the general public. (It is noted in passing that the industry desires to insert the abbreviation "av." for "average" into the disclosure format. The staff believes that the disclosure format would be better without the use of "av." However, the tar and nicotine values obtained by the Commission testing procedure are in fact averages, and for that reason the staff has no strong objection to the inclusion of the abbreviation "av." in the disclosure.)

4. Lack of an Enforcement Mechanism. When the Commission staff first met with representatives of the Tobacco Institute, the staff expressed the view that one essential element of any voluntary scheme for disclosure of tar and nicotine content in cigarette advertising would be an effective

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1/ See page 3 of industry's "Explanatory Memorandum Relating to Voluntary Program for 'tar' and Nicotine Disclosure," dated October 23, 1970, attached.

and efficient enforcement mechanism. To give a concrete illustration of the mechanism envisioned, the staff drafted and presented to the Tobacco Institute representatives a proposed complaint and consent order in which each cigarette manufacturer would agree to cease and desist from failing to disclose in all advertising the tar and nicotine content of the advertised variety or varieties based on the most recently published Commission test results. The Tobacco Institute representatives told the staff that such a consent order mechanism was completely unacceptable to their member companies. The staff then suggested that they propose an alternative mechanism which would insure compliance with their voluntary disclosure proposal. The submission from the cigarette manufacturers dated October 23, 1970, contains no enforcement mechanism. If the Commission were to accept this proposal, and if at some time in the future one or more participating cigarette manufacturers determined that it would be advantageous to cease disclosure of tar and nicotine content in cigarette advertising, the Commission would be in no better legal position to compel disclosure than it is at this time. The staff believes that the past record of cigarette manufacturers in matters related to false and misleading advertising makes reliance on their good faith alone for any program of voluntary compliance highly inadvisable.

Although this proposal has no specific provision to insure the participating manufacturers' compliance, the accompanying memorandum has a clearly written escape clause which would allow the manufacturers to withdraw from their agreement if the Commission fails to "conduct and publish new test results at least six months after an earlier test has been published . . . ." While the staff anticipates that the Cigarette testing laboratory would have no difficulty under normal operating conditions in conducting and publishing the results of at least one test for tar and nicotine content every six months, the terms of the manufacturers' accompanying memorandum make no provision for accidents, illness or dis-

asters which might interfere with the mechanics of the testing program and the subsequent publication of test results. As the Commission knows, the testing machine is a delicate, expensive piece of equipment requiring periodic maintenance; a minor breakdown which delayed testing results for only a few days could result in the invocation of the escape clause by the industry. The staff believes that provisions such as this escape clause reveal much about the attitude of the industry in submitting its proposal.

Conclusion and Recommendations. For the reasons set forth above the staff strenuously urges the Commission to reject the industry's proposal in its entirety. The staff believes that further discussions with representatives of the Tobacco Institute are most unlikely to be fruitful, and for that reason recommends that the Commission reschedule the hearing on the proposed Trade Regulation Rule to require disclosure of tar and nicotine content in cigarette advertising. Attached is a list of persons and groups who have expressed interest in presenting testimony on the proposed Rule.

It is noted that the Commission news release dated October 1, 1970, relating to the Commission action which invited representatives of the cigarette manufacturers to submit their proposal to disclose tar and nicotine content in cigarette advertising, contains the statement: "The written submissions by the industry will be laced on the public record for 30 days for public comment." The cut-off date for public comment on the industry proposal has been set for December 1, 1970. The staff expects to devote most of its time during the months of November and December to the preparation of the Report to Congress on Cigarette Advertising and Labeling, which the Commission is required to submit not later than January 1, 1971, by provisions of the Public Health Cigarette Smoking Act.

If the Commission accepts the staff recommendation to reject the industry proposal and reschedule the hearing on the

proposed Trade Regulation Rule, the staff further recommends that a date for the hearing be set in January of 1971.

Respectfully submitted,
/s/
Allen F. Brauninger,
Attorney,

APPROVED:

/s/
Gerald J. Thain,
Acting Assistant Director for Food & Drug Advertising.

/s/
Paul A. Jamarik,
Acting Director,
Bureau of Consumer Protection.

cc: General Counsel, and,
Acting Assistant Director for Scientific Opinions.

Attachments include Statement of the Surgeon General, U.S. Public Health Service on Proposed FTC Rule.

CP: AFBrauninger:rlc

UNITED STATES GOVERNMENT

MEMORANDUM

Date: November 24, 1970

TO : Commission

FROM : Miles W, Kirkpatrick, Chairman

SUBJECT: Industry Proposal for Disclosure of Tar and Nicotine Content in Cigarette Advertising

The staff recommends rejection of the tobacco industry's proposal for voluntary disclosure of tar and nicotine content in cigarette advertising. This recommendation is based on four objections to the industry proposal. First, it fails to include point-on-sale display materials in the advertising covered by the proposal. Secondly, it allows in some instances the use of tar and nicotine data from laboratories operated by the manufacturers. Thirdly, it contains a format for disclosing tar and nicotine content which would not convey clearly to the general public the date of the Commission test results to which reference is made. Finally, it lacks any enforcement mechanism.

Since the cut-off date for public comment on the industry proposal has been set for December 1, 1970, it will be appropriate to begin discussion of our course of action at our next meeting, and I invite the staff to attend this discussion.

UNITED STATES GOVERNMENT

MEMORANDUM

Date: Dec 21 1970

TO : Commission.

FROM : Allen F. Brauninger, Attorney
Division of Food & Drug Advertising,
Bureau of Consumer Protection.

SUBJECT: Modification of Industry Proposal for Disclosure of Tar and Nicotine Content in Cigarette Advertising—Implementation Recommended.

By memorandum dated November 9, 1970, the undersigned outlined objections to a proposal to disclose tar and nicotine content on a voluntary basis submitted on October 23, 1970, by eight cigarette manufacturers as an alternative to the Commission's proposed rule-making activity. The principal objections to the industry proposal discussed in the previous memorandum were:

(1) Failure to include point-of-sale display materials;

(2) Use of tar and nicotine data from laboratories operated by manufacturers;

(3) Reference to Commission test reports by number instead of by date when disclosing tar and nicotine; and

(4) Lack of an enforcement mechanism.

On December 18, 1970, the eight manufacturers who had proposed voluntary disclosure of tar and nicotine content in cigarette advertising submitted a modification of their original plan and requested reconsideration by the Commission.

The modified proposal adds to the description of advertising in which tar and nicotine content would be disclosed

"all advertising printed on signs displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period." The staff believes that the amended language covers the large majority of point-of-sale materials. The staff realizes that a number of such materials would still fall outside the advertising subject to tar and nicotine disclosure; including such items as metal or plastic signs, window decals, clocks, calendars, thermometers, and metal or plastic stands to display cigarette packages. It is believed that these are relatively minor items and that the important point-of-sale materials, such as the counter display cards currently being used in connection with specific advertising campaigns for various brands of cigarettes, are now included in the industry plan.

The modification concerning coverage also deletes the word "paid" from the definition of billboards–subject to the proposal. This change clarifies any ambiguity about the status of signs to promote the sale of cigarettes which appear on buildings, vehicles or other property owned by cigarette manufacturers.

In the previous memorandum, the staff discussed at length the problems presented by that portion of the industry proposal which would have allowed industry members to request retesting when "any company determines that the tar or nicotine values of any of its varieties have become larger or smaller by more than twenty percent of the most recently published rounded Commission test results." The modification to the industry proposal requires that any manufacturer who desires a retest must support his request with laboratory test results. The modification further provides that a market sample for retesting must be collected by Western Union in accordance with the Commission's sampling procedures, at the expense of the manufacturer who desires retesting; allows the Commission 45 working days (nine weeks) in which to conduct the retest; and specifies that in the event the Com-

mission cannot complete the retest within 45 working days, results from the Tobacco Institute Testing Laboratory (not the manufacturer's laboratory) may be used in advertising. The staff believes that these additional provisions should be adequate to prevent any flood of spurious requests for retesting, which was a matter of concern under the earlier proposals submitted by the industry.

The industry proposal still allows use of test data obtained from laboratories operated by the manufacturers in advertising for any variety which is not included on the Commission's published test report—either because the variety was not marketed until after the last test was completed, or because the variety was inadvertently omitted by the Commission laboratory. While it would be desirable for the Commission laboratory to test new varieties before introductory advertising is begun, the staff believes that if a manufacturer deliberately misrepresented tar or nicotine content of a new variety, subsequent market sampling and testing could give grounds for issuance of a complaint, possibly including an order to require disclosure of previous false advertising in appropriate cases.

The previous memorandum also discussed the problems presented in the industry's original proposal to identify FTC test reports by number rather than by date when disclosing tar and nicotine content. The modified proposal requires identification of test reports by the month and year of publication, thus solving this problem.

The modification also provides that the plan shall take effect within 30 working days (six weeks) after the Commission gives notice to the industry that it favors implementation of the manufacturers' proposal.

The modification makes no provision for any enforcement mechanism. The Division of Food & Drug Advertising has previously indicated the dangers inherent in allowing this industry to proceed under self-regulation. However, if the

Commission is willing to forego the requirement of an enforcement mechanism, the staff believes that the modified industry proposal is the best attainable alternative to further proceedings on the proposed Trade Regulation Rule.

The staff has read the memorandum dated December 14, 1970, which the General Counsel submitted on the modification to the industry plan, and concurs with the analysis and recommendations contained in that memorandum.

Respectfully submitted,
/s/
Allen F. Brauninger,
Attorney.

APPROVED:

/s/
Gerald J. Thain,
Acting Assistant Director
for Food & Drug Advertising.

/s/
Robert Pitofsky,
Director,
Bureau of Consumer Protection.

cc: General Counsel
Acting Assistant Director
for Scientific Opinions.

CP: AFBrauninger:rlc

THE TOBACCO INSTITUTE, INC.

1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20006

296-8434

HORACE R. KORNEGAY
PRESIDENT & EXECUTIVE DIRECTOR

December 17, 1970

Gentlemen:

In accordance with the Commission's Press Release of October 1, 1970, requesting cigarette manufacturers to advise the Commission exactly how they voluntarily intend to disclose "tar" and nicotine content in cigarette advertising under a voluntary program, I am pleased to transmit to the Commission the enclosed letter, which constitutes a revision of the letter and memorandum forwarded to the Commission on October 23, 1970, signed by Brown & Williamson Tobacco Corporation; Larus & Brother Company, Inc., Trading as The House of Edgeworth; Liggett & Myers Incorporated; Lorillard, a Division of Loew's Theatres, Inc.; Philip Morris U.S.A.; R. J. Reynolds Tobacco Company; Stephano Brothers; and United States Tobacco Company.

The companies are aware of the Commission's view, as expressed in the Press Release, by Chairman Miles W. Kirkpatrick, that "A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately."

In submitting the program embodied in the enclosed letter on behalf of these companies, I have been directed to state further on behalf of each of them that it is not to be considered an admission that the Federal Trade Commission is authorized to promulgate a trade regulation rule, or that this voluntary program may be included for any purpose in any

public hearing held on the Federal Trade Commission's proposal of August 8, 1970, or any like proposal.

While each company will fully adhere to the voluntary program submitted, it does not by doing so admit that the failure affirmatively to disclose in its advertising any "tar" and nicotine test results, which the Federal Trade Commission from time to time determines and publishes, constitutes a violation of law.

I understand that Liggett & Myers Incorporated is writing a separate letter to the Commission explaining the basis upon which it is a signatory to the voluntary proposal submitted.

In order to facilitate the Commission determination, I am enclosing a memorandum of some explanatory material and facts underlying the provisions of the proposed voluntary program.

Very truly yours,
/s/
Horace R. Kornegay

Enclosures

FEDERAL TRADE COMMISSION
RECEIVED
DEC 18 1970
SECRETARY

December 17, 1970

Federal Trade Commission
Washington, D.C. 20580

Gentlemen:

In accordance with the Commission Press Release of October 1, 1970, each of the undersigned companies which manufactures, or is a primary distributor of, varieties of cigarettes which are presently advertised, and any of its subsidiaries similarly engaged, is writing to set forth a voluntary program for the disclosure of "tar" and nicotine in its paid consumer-directed cigarette advertising in the United States placed by each of the undersigned companies.

Under this program, each company will disclose clearly and prominently for the variety of cigarettes advertised the values for "tar" in milligrams and for nicotine in tenths of a milligram contained in the Federal Trade commission published test results, under its present methodology, in all advertising in newspapers, magazines, and other periodicals published and distributed in the United States, including newspapers, magazines, and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, in advertisements appearing on billboards in the United States, in advertisements printed on handbills and in direct mail circulars that are distributed to consumers in the United States, and in advertisements on signs, displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period.

Each of these advertisements will include the "tar" and nicotine data, as rounded off by the Federal Trade Commis-

sion, from the Commission test results most recently published in the Federal Register. However, in order to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, each company may use the "tar" and nicotine data from the published Commission test results covering the test prior to the most recently published test, in lieu of the most recently published test results, (a) in all advertising in those issues of newspapers, magazines, and other periodicals for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type to the production house, is less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (b) in all advertising printed on handbills and in direct mail circulars which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (c) in all advertising appearing on billboards which is delivered in final form to the printer, or is painted or assembled, less than thirty working days after publication of the most recently published Commission test results in the Federal Register; and (d) in all advertising printed on signs displayed inside of stores and other places of business selling cigarettes, which is reasonably not expected to be exposed to the public beyond a six month period, which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register.

The disclosure will be in the following language:

_____ mg. "tar", _____ mg. nicotine
av. per cigarette, FTC Report (date).

Necessarily, the carrying out of this voluntary program is predicated upon the Commission continuing to test the adver-

tised varieties of cigarettes and to publish its results in the Federal Register at regular and periodic intervals of not more than six months.

Where the most recent Commission published test results do not include a variety then manufactured or primarily distributed and advertised by any company, that company will disclose in its advertising, until Commission test results on that variety are next published, the "tar" and nicotine values determined by that company in its own "tar" and nicotine test on that variety conducted in accordance with the present Federal Trade Commission methodology. In the interval prior to the publication of Commission test results, that company will utilize the following language:

_____ mg. "tar", _____ mg. nicotine
av. per cigarette by FTC method.

If at any time any company undertakes the manufacture or the primary distribution of a new variety of cigarettes to be advertised, it will under this program disclose in its advertising the "tar" and nicotine values determined by that company in its own "tar" and nicotine tests on that new variety conducted in accordance with the present Federal Trade Commission methodology, when it begins the advertising of that new variety.

In the event that any company determines from test data that the "tar" or nicotine value of any of its varieties available to consumers has become larger or smaller by more than twenty percent of the most recently published rounded Commission test results, that company may request the Commission to conduct a special test on such variety based upon a sample of cigarettes picked up in the marketplace by Western Union, in accordance with arrangements between the Commission and Western Union, with the requesting company bearing all costs of such a pick-up. The requesting company may simultaneously with its request to the Commission, also request the Tobacco Institute Testing Laboratory to obtain

from Western Union a similar market pick-up of the variety. If within forty-five working days after the company's request to the Commission, the Commission supplies the company with its test results, the company will thereafter utilize those test results in advertising placed after that date in accordance with this program. If the Commission does not supply test results within forty-five working days, then the company will utilize, in accordance with this program, test results of the Tobacco Institute Testing Laboratory on the market sample until such time as the Commission test results are made available to it.

The submission or the carrying out of this program does not constitute an admission by any company that "tar" and nicotine have any significance in relation to human health.

Each of these companies is confident that the program presented, which they intend to begin thirty working days after the Commission has considered it in lieu of any formal Trade Regulation Rule proceeding and hearing, constitutes a plan that is feasible.

Respectfully submitted,

BROWN & WILLIAMSON TOBACCO CORPORATION

By /s/_____
Addison Yeaman,
Executive Vice President

LARUS & BROTHER COMPANY, INC., TRADING AS THE HOUSE OF EDGEWORTH

By /s/_____
W. Brooks George,
Chairman of the Board

LIGGETT & MYERS INCORPORATED

By /s/ _____
Milton E. Harrington,
President

LORILLARD, a Division of Loew's Theatres, Inc.

By /s/ _____
Curtis H. Judge, President

PHILIP MORRIS U.S.A.

By /s/ _____
Ross R. Millhiser, President

R.J. REYNOLDS TOBACCO COMPANY

By /s/ _____
Colin Stokes, Chairman of
the Board

STEPHANO BROTHERS

By /s/ _____
Constantino Stephano

UNITED STATES TOBACCO COMPANY

By /s/ _____
L.A. Bantle, President

FEDERAL TRADE COMMISSION
RECEIVED
DEC 18 1970
SECRETARY

December 17, 1970

EXPLANATORY MEMORANDUM RELATING TO VOLUNTARY PROGRAM FOR "TAR" AND NICOTINE DISCLOSURE

The following memorandum is intended to provide some explanatory material relating to various portions of the letter of December 17, 1970, forwarded to the Commission by eight cigarette manufacturers.

ADVERTISING COVERED

This program is applicable to cigarette advertising in newspapers, magazines, and other periodicals; as well as advertising on billboards, on handbills, and in direct mail circulars; and on signs displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period. Certain promotional or display items such as ashtrays, cigarette lighters, decals, display units, and pencils imprinted with cigarette advertising, are not included because there is no practical way to change "tar" and nicotine figures thereon, were they used on these items, to reflect changes in the "tar" and nicotine content of the variety of cigarette mentioned. Many items of this nature pass from the control of the company concerned or are semi-permanent and may last for a number of years. If such items were included in this program, this would lead to the presence of old, and perhaps inaccurate figures being presented to consumers, and consumer confusion would be engendered by the conflict between those figures and current figures being advertised.

In order to eliminate any possible confusion, the term "billboards" shall mean:

(1) Media billboard advertising messages on the following structures exposed to the general public:

2-30 Sheet Billboards;
Painted Billboards;
Spectacular Billboards; and

(2) Advertising messages on the following structures or transportation vehicles exposed to the general public:

Trucks;
Public Transit Vehicles;
Transit Station Platforms;
Transportation Terminals.

A sign on a plant, warehouse or other facility related to the manufacture of cigarettes, which identifies such plant, warehouse or facility is not considered a billboard within this program.

LEAD TIME

All advertisements must be submitted in advance of their publication date by some period of time, usually called the lead time, which varies from periodical to periodical. This lead time is several weeks for some periodicals and several months for others. Necessarily, when the Commission publishes a new report of test results on June 1st, it is physically impossible for the figures included in that report to appear in June and July advertisements in some periodicals. A workable solution is provided to this problem in order to make this voluntary program capable of practical implementation in the light of requirements dictated by the mechanics of publishing and advertising.

Any workable solution to this problem must inescapably utilize ascertainable dates when definable acts must take place. The program does this. It utilizes publication in the Federal Register of the Commission test results as a starting date, which is definitely ascertainable, and it employs dates such as closing date and delivery in final form to the printer

in order that it can be precisely determined when the time period terminates. These dates of delivery to the printer and closing date were selected, rather than the date of the appearance of the periodical in homes or on newsstands, or the date on the cover of a periodical, because the dates specified are the times at which control over the advertising passes from the hands of the cigarette company.

In employing the date of publication of the Commission test results in the Federal Register, it is recognized that the company advertising cannot as a practical matter require the Commission to publish its results in the Federal Register. It is anticipated, however, that the Commission will accept the responsibility regularly, and at not more than six month intervals, to publish its results in the Federal Register.

In the case of billboards, handbills, and direct mail circulars, in addition to complying with the lead time requirements, each company will use its best efforts to have "tar" and nicotine figures appearing based upon published Commission test results as recent as practically possible.

THE LANGUAGE OF THE DISCLOSURE

The legends set forth in the program for disclosing "tar" and nicotine are intended to supply sufficient information to explain the source and nature of the "tar" and nicotine figures disclosed without confusing the consumer. An abbreviation for the word average is included to make it clear that the FTC figures are not based on testing individual cigarettes, but are instead averages of the averages obtained by smoking five cigarettes on each or twenty ports.

In the first legend, relating to a Commission market pick-up, the FTC Report, from which the "tar" and nicotine figures are taken is to be identified by its date in the form of an abbreviation of the month and year, e.g., Jan. '71.

CONTINUATION OF COMMISSION TESTING

This entire program is predicated upon the continued testing by the Federal Trade Commission at regular and periodic intervals of approximately 4-6 months. Obviously if the Commission should, for some reason, totally discontinue its testing operations, or fail to conduct and publish new test results at least six months after an earlier test has been published, then it would be uninformative to consumers if each company continued to use the old, out-dated figures obtained in an earlier Commission test.

THE COMMISSION'S FAILURE TO TEST AN EXISTING VARIETY

Cigarette companies sometimes market certain varieties in only a few localities, or in relatively small quantities. Under the current system of Commission pickup of market samples, a situation might occur in which the Commission failed to pick up any cigarettes of an advertised variety or a sufficient number to permit testing.

The program provides that in such cases each company may conduct its own tests in accordance with the present Commission methodology and in the interim utilize the results of its tests in advertising. This provision is necessary because no company will have control over the Commission testing, and it is of course possible that the Commission may, for some reason, fail to test cigarettes of one or more advertised varieties. It is not reasonable that such a failure on the part of the Commission should effectively preclude advertising of that variety because of the absence of Commission "tar" and nicotine figures. It is only to avoid this possibility that the company concerned may use its own test results on existing varieties. It is to be emphasized, however, that it is extremely unlikely as a practical matter that with an organized Commission testing program the Commission would ever fail to test one or more existing varieties.

NEW VARIETIES

Cigarette companies sometimes begin marketing new varieties of cigarettes to respond to various consumer demands and other marketing factors. The effective marketing of these new varieties requires that "tar" and nicotine figures for those varieties be obtained in a very prompt way which will not require time consuming procedures to protect information believed by the cigarette company to be a trade secret and commercially valuable. The program provides an effective procedure in that situation by disclosure of "tar" and nicotine on the basis of the company's own testing in accordance with the Commission methodology until the next Federal Register publication.

CHANGES IN THE "TAR" AND NICOTINE CONTENT IN VARIETIES OF CIGARETTES

The "tar" or nicotine content of some varieties of cigarettes may change from time to time. Sometimes these changes are relatively small and at other times these changes may represent a substantial percentage of the preceding "tar" and nicotine figures. Some of these changes are the result of a decision of a cigarette company to alter cigarette design or formulation, as, for example, the use of a longer filter. Other changes may be the result of variations in tobacco crops which cannot be controlled. The program provides a suitable procedure to be used in connection with these changes when they are significant in order to make available to consumers test results which are more current than those earlier published. During the period until more current test results are available, the company will utilize the latest published Commission test results.

COMMENCEMENT

Thirty working days, i.e., the lead time, are required for this program to become effective after its consideration by the Commission. This means that if notice of Commission consideration is received on December 22, for example, then

"tar" and nicotine data will be included in all advertising placed more than thirty working days after December 22 in accordance with this program.

POINT 1: Correct language at bottom of page 1 of letter.

THE LETTER:

In the last line of page 1 of the letter, insert the words "those issues of" before "newspapers."

THE MEMORANDUM:

No revision necessary in memorandum.

POINT 2: Employ the date of the Commission test results in the legend.

THE LETTER:

In the letter, revise the last line of the legend in the middle of page 2 to state "av. per cigarette, FTC Report (date)".

THE MEMORANDUM:

In the memorandum, eliminate the last paragraph on page 3 and replace it with the following: "In the first legend, relating to a Commission market pick-up, the FTC Report, from which the 'tar' and nicotine figures are taken is to be identified by its date in the form of an abbreviation of the month and year, e.g., Jan. '71".

POINT 3: The objection to the term "paid" in the definition of billboards in the memorandum.

THE LETTER:

No revision is necessary in the letter.

THE MEMORANDUM:

Delete the word "paid" each of the two times it appears in the definition of billboards at the bottom of page 1 and the top of page 2. Add the following language on the top of page 2 immediately following "transportation terminals": "A sign on a plant, warehouse or other facility related to the manufacture of cigarettes, which identifies such plant, warehouse or facility is not considered a billboard within this program."

POINT 4: The Commencement Date.

THE LETTER:

In the last paragraph of page 3 of the letter, strike the words "as soon as practicable" and replace them with "30 working days."

THE MEMORANDUM:

In the memorandum, add a new paragraph at the end of the memorandum on page 5 as follows:

COMMENCEMENT

Thirty working days, i.e., the lead time, are required for this program to become effective after its consideration by the Commission. This means that if notice of Commission consideration is received on December 20, for example, then "tar" and nicotine data will be included in all advertising placed more than thirty working days after December 20 in accordance with this program.

POINT 5: The Procedures in case of a 20% change.

THE LETTER:

Strike entirely paragraph 2, page 3. Replace it with the following:

"In the event that any company determines from test data that the 'tar' or nicotine value of any of its varieties available to consumers has become larger or smaller by more than twenty percent of the most recently published rounded Commission test results, that company may request the Commission to conduct a special test on such variety based upon a sample of cigarettes picked up in the marketplace by Western Union, in accordance with arrangements between the Commission and Western Union, with the requesting company bearing all costs of such a pick-up. The requesting company may simultaneously with its request to the Commission, also request the Tobacco Institute Testing Laboratory to obtain from Western Union a similar market pick-up of the variety. If within 45 working days after the company's request to the Commission, the Commission supplies the company with its test results, the company will thereafter utilize those test results in advertising placed after that date in accordance with this program. If the Commission does not supply test results within 45 working days, then the company will utilize, in accordance with this program, test results of the Tobacco Institute Testing Laboratory on the market sample until such time as the Commission test results are made available to it."

THE MEMORANDUM:

Correct the paragraph of the memorandum on page 5 relating to changes in "tar" and nicotine in the following manner.

Eliminate the last two sentences beginning "Under this procedure" and replace them with the following:

"During the period until more current test results are available, the company will utilize the latest published Commission test results."

POINT 6: Point of Sale.

THE LETTER:

Page 1, paragraph 2, replace the first "and" in the third line from the bottom of the paragraph with the word "in."

In the last line of paragraph 2, page 1, after "the United States" add, ", and in advertisements on signs, displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period."

On page 2 of the letter in the paragraph which is carried over from page 1, delete "and" before "(c)" and add at the end of the paragraph, "; (d) in all advertising printed on signs displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period, which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register."

THE MEMORANDUM:

In the memorandum, add at the end of the third line of the section entitled "Advertising Covered" "and on signs displayed inside of

stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period."

THE TOBACCO INSTITUTE, INC.
1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20006

296-9434

HORACE R. KORNEGAY
PRESIDENT & EXECUTIVE DIRECTOR

OCTOBER 23, 1970

Federal Trade Commission
Washington, D.C. 20680

Gentlemen:

In accordance with the Commission's Press Release of October 1, 1970, requesting cigarette manufacturers to advise the Commission exactly how they voluntarily intend to disclose "tar" and nicotine content in cigarette advertising under a voluntary program, I am pleased to transmit to the Commission the enclosed letter signed by Brown & Williamson Tobacco Corporation; Larus & Brother Company, Inc., trading as The House of Edgeworth; Liggett & Myers Incorporated, Cigarette and Tobacco Division; Lorillard, a Division of Loew's Theatres, Inc.; Philip Morris U.S.A.; R. J. Reynolds Tobacco Company; Stephano Brothers; and United States Tobacco Company.

The companies are aware of the Commission's view, as expressed in the Press Release, by Chairman Miles W. Kirkpatrick, that, "A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately."

In submitting the program embodied in the enclosed letter on behalf of these companies, I have been directed to state further on behalf of each of them that it is not to be considered an admission that the Federal Trade Commission is authorized to promulgate a trade regulation rule, or that this voluntary program may be included for any purpose in any

public hearing held on the Federal Trade Commission's proposal of August 8, 1970, or any like proposal.

While each company will fully adhere to the voluntary program submitted, it does not by doing so admit that the failure affirmatively to disclose in its advertising any "tar" and nicotine test results, which the Federal Trade Commission from time to time determines and publishes, constitutes a violation of law.

In order to facilitate the Commission determination, I am enclosing a memorandum of some explanatory material and facts underlying the provisions of the proposed voluntary program.

Very truly yours,
/s/
Horace R. Kornegay

Enclosures

October 23, 1970

Federal Trade Commission
Washington, D.C. 20580

Gentlemen:

In accordance with the Commission Press Release of October 1, 1970, each of the undersigned companies which manufactures, or is a primary distributor of, varieties of cigarettes which are presently advertised, and any of its subsidiaries similarly engaged, is writing to set forth a voluntary program for the disclosure of "tar" and nicotine in its paid consumer-directed cigarette advertising in the United States placed by each of the undersigned companies.

Under this program, each company will disclose clearly and prominently for the variety of cigarettes advertised the values for "tar" in milligrams and for nicotine in tenths of a milligram contained in the Federal Trade Commission published test results, under its present methodology, in all advertising in newspapers, magazines, and other periodicals published and distributed in the United States, including newspapers, magazines, and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, in advertisements appearing on billboards in the United States, and advertisements printed on handbills and in direct mail circulars that are distributed to consumers in the United States.

Each of these advertisements will include the "tar" and nicotine data, as rounded off by the Federal Trade Commission, from the Commission test results most recently published in the Federal Register. However, in order to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, each company may use the "tar" and nicotine data from the published Commission test results covering the test prior to the most recently published test, in lieu of the most recently published test results, (a) in all ad-

vertising in newspapers, magazines, and other periodicals for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type to the production house, is less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (b) in all advertising printed on handbills and in direct mail circulars which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register; and (c) in all advertising appearing on billboards which is delivered in final form to the printer, or is painted or assembled, less than thirty working days after publication of the most recently published Commission test results in the Federal Register.

The disclosure will be in the following language:

_____ mg. "tar", _____ mg. nicotine
av. per cigarette, FTC Report _____.

Necessarily, the carrying out of this voluntary program is predicated upon the Commission continuing to test the advertised varieties of cigarettes and to publish its results in the Federal Register at regular and periodic intervals of not more than six months.

Where the most recent Commission published test results do not include a variety then manufactured or primarily distributed and advertised by any company, that company will disclose in its advertising, until Commission test results on that variety are next published, the "tar" and nicotine values determined by that company in its own "tar" and nicotine test on that variety conducted in accordance with the present Federal Trade Commission methodology. In the interval prior to the publication of Commission test results, that company will utilize the following language:

_____ mg. "tar", _____ mg. nicotine
av. per cigarette by FTC method.

If at any time any company undertakes the manufacture or the primary distribution of a new variety of cigarettes to be advertised, it will under this program disclose in its advertising the "tar" and nicotine values determined by that company in its own "tar" and nicotine tests on that new variety conducted in accordance with the present Federal Trade Commission methodology, when it begins the advertising of that new variety.

In the event that any company determines that the "tar" or nicotine values of any of its varieties have become larger or smaller by more than twenty percent of the most recently published rounded Commission test results, that company will submit that variety of cigarettes to the Commission for testing. If within thirty working days the Commission supplies that company with its test determinations, the company will thereafter utilize those results in advertising placed after that date in accordance with this program. If the Commission does not supply test results within thirty working days, then the company will utilize, in accordance with this program, its own test results until such time as the Commission test results are made available to it.

The submission or the carrying out of this program does not constitute an admission by any company that "tar" and nicotine have any significance in relation to human health.

Each of these companies is confident that the program presented, which they intend to begin as soon as practicable after the Commission has considered it in lieu of any formal Trade Regulation Rule proceeding and hearing, constitutes a plan that is feasible.

Respectfully submitted,

BROWN & WILLIAMSON TOBACCO CORPORATION

By /s/_____
Addison Yeaman,
Executive Vice President

LARUS & BROTHER COMPANY, INC., TRADING AS THE HOUSE OF EDGEWORTH

By /s/_____
W. Brooks George,
Chairman of the Board

LIGGETT & MYERS INCORPORATED CIGARETTE AND TOBACCO DIVISION

By /s/_____
Kenneth McAllister,
President

LORILLARD, a Division of Loew's Theatres, Inc.

By /s/_____
Curtis H. Judge, President

PHILIP MORRIS U.S.A.

By /s/_____
Ross R. Millhiser, President

R.J. REYNOLDS TOBACCO COMPANY

By /s/_____
Colin Stokes, Chairman of
the Board

STEPHANO BROTHERS
By /s/_____
Constantino Stephano

UNITED STATES TOBACCO COMPANY
By /s/_____

October 23, 1970

EXPLANATORY MEMORANDUM RELATING TO VOLUNTARY PROGRAM FOR "TAR" AND NICOTINE DISCLOSURE

The following memorandum is intended to provide some explanatory material relating to various portions of the letter of October 23, 1970, forwarded to the Commission by eight cigarette manufacturers.

ADVERTISING COVERED

This program is applicable to cigarette advertising in newspapers, magazines, and other periodicals, as well as advertising on billboards, on handbills and in direct mail circulars. Certain promotional or display items such as ashtrays, cigarette lighters, decals, display units, and pencils imprinted with cigarette advertising, are not included because there is no practical way to change "tar" and nicotine figures thereon, were they used on these items, to reflect changes in the "tar" and nicotine content of the variety of cigarette mentioned. Many items of this nature pass from the control of the company concerned or are semi-permanent and may last for a number of years. If such items were included in this program, this would lead to the presence of old, and perhaps inaccurate figures being presented to consumers, and consumer confusion would be engendered by the conflict between those figures and current figures being advertised.

In order to eliminate any possible confusion, the term "billboards" shall mean:

(1) Paid media billboard advertising messages on the structures exposed to the general public:

2-30 Sheet Billboards;
Painted Billboards;
Spectacular Billboards; and

(2) Paid advertising messages on the following structures or transportation vehicles exposed to the general public:

Trucks;
Public Transit Vehicles;
Transit Station Platforms;
Transportation Terminals.

LEAD TIME

All advertisements must be submitted in advance of their publication date by some period of time, usually called the lead time, which varies from periodical to periodical. This lead time is several weeks for some periodicals and several months for others. Necessarily, when the Commission publishes a new report of test results on June 1st, it is physically impossible for the figures included in that report to appear in June and July advertisements in some periodicals. A workable solution is provided to this problem in order to make this voluntary program capable of practical implementation in the light of requirements dictated by the mechanics of publishing and advertising.

Any workable solution to this problem must inescapably utilize ascertainable dates when definable acts must take place. The program does this. It utilizes publication in the Federal Register of the Commission test results as a starting date, which is definitely ascertainable, and it employs dates such as closing date and delivery in final form to the printer in order that it can be precisely determined when the time period terminates. These dates of delivery to the printer and closing date were selected, rather than the date of the appearance of the periodical in homes or on newsstands, or the date on the cover of a periodical, because the dates specified are the times at which control over the advertising passes from the hands of the cigarette company.

In employing the date of publication of the Commission test results in the Federal Register, it is recognized that the company advertising cannot as a practical matter require the

Commission to publish its results in the Federal Register. It is anticipated, however, that the Commission will accept the responsibility regularly, and at not more than six month intervals, to publish its results in the Federal Register.

In the case of billboards, handbills, and direct mail circulars, in addition to complying with the lead time requirements, each company will use its best efforts to have "tar" and nicotine figures appearing based upon published Commission test results as recent as practically possible.

THE LANGUAGE OF THE DISCLOSURE

The legends set forth in the program for disclosing "tar" and nicotine are intended to supply sufficient information to explain the source and nature of the "tar" and nicotine figures disclosed without confusing the consumer. An abbreviation for the word average is included to make it clear that the FTC figures are not based on testing individual cigarettes, but are instead averages of the averages obtained by smoking five cigarettes on each of twenty ports.

In the first legend, relating to a Commission market pickup, FTC reports identified by number are employed rather than dates because the existence of a date would be more confusing to consumers than merely report numbers. This is particularly true because the only value of a date or report number is to permit consumers to distinguish between different sets of figures in terms of which published result is more recent. This distinction can be more easily made on the basis of report numbers. In view of the previous FTC testing, it is recommended that the report numbers to be covered by this program might begin with No. 10.

CONTINUATION OF COMMISSION TESTING

This entire program is predicated upon the continued testing by the Federal Trade Commission at regular and periodic intervals of approximately 4-6 months. Obviously if the Commission should, for some reason, totally discontinue its

testing operations, or fail to conduct and publish new test results at least six months after an earlier test has been published, then it would be uninformative to consumers if each company continued to use the old, out-dated figures obtained in an earlier Commission test.

THE COMMISSION'S FAILURE TO TEST AN EXISTING VARIETY

Cigarette companies sometimes market certain varieties in only a few localities, or in relatively small quantities. Under the current system of Commission pickup of market samples, a situation might occur in which the Commission failed to pick up any cigarettes of an advertised variety or a sufficient number to permit testing.

The program provides that in such cases each company may conduct its own tests in accordance with the present Commission methodology and in the interim utilize the results of its tests in advertising. This provision is necessary because no company will have control over the Commission testing, and it is of course possible that the Commission may, for some reason, fail to test cigarettes of one or more advertised varieties. It is not reasonable that such a failure on the part of the Commission should effectively preclude advertising of that variety because of the absence of Commission "tar" and nicotine figures. It is only to avoid this possibility that the company concerned may use its own test results on existing varieties. It is to be emphasized, however, that it is extremely unlikely as a practical matter that with an organized Commission testing program the Commission would ever fail to test one or more existing varieties.

NEW VARIETIES

Cigarette companies sometimes begin marketing new varieties of cigarettes to respond to various consumer demands and other marketing factors. The effective marketing of these new varieties requires that "tar" and nicotine figures for those varieties be obtained in a very prompt way which will not

require time consuming procedures to protect information believed by the cigarette company to be a trade secret and commercially valuable. The program provides an effective procedure in that situation by disclosure of "tar" and nicotine on the basis of the company's own testing in accordance with the Commission methodology until the next Federal Register publication.

CHANGES IN THE "TAR" AND NICOTINE CONTENT IN VARIETIES OF CIGARETTES

The "tar" or nicotine content of some varieties of cigarettes may change from time to time. Sometimes these changes are relatively small and at other times these changes may represent a substantial percentage of the preceding "tar" and nicotine figures. Some of these changes are the result of a decision of a cigarette company to alter cigarette design or formulation, as, for example, the use of a longer filter. Other changes may be the result of variations in tobacco crops which cannot be controlled. The program provides a suitable procedure to be used in connection with these changes when they are significant in order to make available to consumers test results which are more current than those earlier published. Under this procedure each company will submit cigarettes of the variety which has changed in "tar" or nicotine content to the Commission for its testing, and if that is not feasible, the company will disclose "tar" and nicotine on the basis of its own testing in accordance with the Commission methodology until the next Federal Register publication. During the period in which cigarettes have been submitted to the Commission, the company will utilize the latest published Commission test results.

RECEIVED
DEC 28 1970
LEGAL RECORDS

FOR CONFIDENTIAL STAFF USE ONLY

December 22, 1970

Memorandum for General Counsel,
Director, Bureau of Consumer Protection,
Director of Public Information,
Legal and Public Records:

File 682 3093—Cigarette Testing
In re: Proposed Methodology for Determination of Tar and Nicotine Content

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Reference is made to memorandum of December 14, 1970 from the General Counsel reporting pursuant to the action of December 3, 1970.

The Commission took the following action:

In re: (1) Voluntary Plan by The Tobacco Industry for Disclosure of Tar and Nicotine Content in Cigarette Advertising;
(2) Trade Regulation Rule Proceeding Requiring Disclosure of Tar and Nicotine Content in Cigarette Advertising.

The Commission determined to suspend indefinitely the proceeding for a trade regulation rule covering disclosure of tar and nicotine content in cigarette advertising, which proceeding was authorized by action of August 4, 1970, and to afford the tobacco industry an opportunity to implement the letter and the spirit of the amended plan which it has proposed.

In taking the above action, the Commission is retaining the unconditional right to reschedule the trade regulation rule

proceedings and to take any other action relating to this subject at any time it deems such action to be necessary or desirable in the public interest.

The Commission approved the "Statement of The Commission" to the above effect, as amended at the table and noted on the marked copy; and directed that a notice of suspension of the Trade Regulation Rule be placed in the Federal Register, and that a news release incorporating the "Statement of the Commission" be issued.

For the public record, the five Commissioners voted in the affirmative as to the foregoing action.

By direction of the Commission.

The papers are transmitted to the General Counsel.

/s/
Joseph W. Shea,
Secretary.

bw

THE TOBACCO INSTITUTE, INC.

1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20005

296-8434

HORACE R. KORNEGAY
PRESIDENT & EXECUTIVE DIRECTOR

September 11, 1970

Honorable Miles W. Kirkpatrick
Chairman Designate
Federal Trade Commission
Washington, D. C.

Dear Mr. Kirkpatrick:

We are addressing you on behalf of the Brown & Williamson Tobacco Corp., Larus & Brother Co., Inc., Liggett & Myers, Inc., Lorillard, a Division of Loew's Theatres, Inc., Philip Morris Incorporated, R. J. Reynolds Tobacco Company, and United States Tobacco Company. These seven cigarette manufacturers include all but two of the domestic producers of cigarettes. Of these two, we understand that one is prepared to address you promptly on the subject of this letter, and that is the case of the other, which conducts a very minor amount of cigarette advertising, a separate letter will shortly be forthcoming.

With respect to the Commission's recently proposed trade regulation rule regarding disclosure of "tar" and nicotine content in cigarette advertising, we are aware of and in general agreement, as you were, with the views expressed by Senator Magnuson, the Chairman of the Senate Committee on Commerce, during your recent confirmation hearing, to the effect that a voluntary agreement on this matter would be preferable to rule-making, litigation or legislation.

Despite the lack of scientific proof that "tar" and nicotine have any significance in relation to human health, these seven companies have indicated their willingness to explore with the Commission a practicable basis for a voluntary agreement in keeping with practicalities of the market place.

Each of the seven cigarette manufacturers on whose behalf this letter is written has indicated its willingness to include an appropriate reference in advertising to the "tar" and nicotine content of each advertised variety on the basis of the published results of the Commission's cigarette testing laboratory.

Our views as to sample size, methodology employed for testing, and the technique of reporting the Commission's test results are fully recorded at the Commission, and there has been continued cooperation between the Commission and Institute technical staffs.

In our study of this subject, we have encountered several questions which should be resolved in cooperation with the Commission, such as the coverage of non-print, semi-permanent advertisements, the necessity for including in the test results newly developed varieties or varieties not generally available and not presently included in the Commission's testing, the inescapable problem of the lead time required for the placement of periodical advertising, and some procedure for the prompt correction of any calculation errors or inadvertently erroneous test results.

As to each of these, we are prepared promptly to suggest satisfactory solutions which we believe would permit the program to be carried out efficiently and fairly to afford to the public as reliable a disclosure as feasible on the basis of the current sampling and methodology employed by the Commission.

In addition, we are prepared to discuss available methods for insuring compliance with the voluntary program, in the form of individual company assurances of future compliance and

possible expeditious methods for Commission action against any failure to comply, that will additionally serve to insure its effective implementation.

We hope that the Commission can promptly indicate its willingness to explore this voluntary agreement path in lieu of any formal proceedings, and we are prepared immediately to present to the Commission the implementation and lead time refinements involved.

We believe that the Commission will agree that this proposal and its prompt implementation are desirable.

Very truly yours,

/s/ HORACE R. KORNEGAY

Horace R. Kornegay
President

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY

September 16, 1970

Mr. Horace R. Kornegay
The Tobacco Institute, Inc.
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Kornegay:

This is in response to your letter of September 11, 1970, addressed to Chairman-designate Kirkpatrick.

The Commission is willing to explore, through The Tobacco Institute, Inc., the possibility of reaching an agreement with all of the cigarette manufacturers on the inclusion of a statement of tar and nicotine contents in cigarette advertising. This position is based, among other things, upon the following:

1. The discussions will take place between designated members of the Commission staff and The Tobacco Institute, Inc., representing certain cigarette manufacturers, with full authority to bind such manufacturers.

2. The discussion shall be conducted on the basis of the terms of the Commission's proposed Trade Regulation Rule, notice of which was issued August 8, 1970, published in the Federal Register, and referred to by you in said letter of September 11, 1970.

3. The Commission will require an expeditious and effective method of insuring compliance with the terms of any agreement.

4. The Commission is unwilling at this time to consider or make commitments with respect to collateral mat-

ters, including presently existing litigation with any cigarette manufacturer.

5. Nothing will be done, at this time, to postpone or cancel the public hearings scheduled for October 15, 1970 on said proposed Trade Regulation Rule.

6. The Commission may terminate these discussions at any time.

The Commission has designated Joseph Martin, Jr., General Counsel, Gerald J. Thain, Assistant Director for Food and Drug Advertising of the Bureau of Consumer Protection, and Allen F. Brauninger, Division of Food and Drug Advertising, to meet with you at your convenience. It should be understood that they have no authority to make commitments which bind the Commission.

By direction of the Commission.

/s/ JOSEPH W. SHEA
Joseph W. Shea
Secretary

FEDERAL TRADE COMMISSION
DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JULY 1, 1978 TO DECEMBER 31, 1978

PUBLISHED BY THE COMMISSION

VOLUME 92

* * *

Proposed advertising plan to disseminate cigarette advertisements headlining, without qualification, tar values higher than latest published FTC number disapproved. [*File No. 773 7016, Lorillard, September 26, 1978*]

Advisory Opinion Letter

September 26, 1978

Dear Mr. Gastman:

This is in response to your request for an advisory opinion as to whether Lorillard may disseminate cigarette advertisements headlining, without qualification, a tar value higher than the latest published FTC number.

The Commission understands that you request was transmitted orally to a Commission staff attorney. Although requests for advice should be submitted in writing to the Secretary of the Commission, § 1.2 of the Commission's Rules of Practice, the Commission has determined to render an advisory opinion because it has sufficient information regarding the proposed course of action.

Under the agreement submitted to the Commission by Lorillard and seven other cigarette companies, dated December 17, 1970, cigarette advertisements must include tar and nicotine data from Commission test results most recently published in the Federal Register, subject to certain specified exceptions necessary to meet deadlines for submission of advertising copy. Lorillard's proposed advertisements would deviate from this industry agreement, by permitting cigarette advertisements to feature a tar number greater than the latest FTC tar number for an indeterminate length of time.

The Commission cannot give its approval to Lorillard's proposed advertising plan. In the Commission's view, it would be deceptive to advertise a tar figure which is higher than the latest applicable FTC tar figure. If the headlined tar level differs from the tar figure disclosed in accordance with the cigarette industry's voluntary disclosure agreement, consumer confusion might be generated. At the same time, the Commission could not condone the practice of utilizing a higher headlined tar figure in the voluntary disclosure and labelling the figures "By FTC Method," since the figures would not actually be the result of the FTC method.

Therefore, in the Commission's opinion, tar values which are set forth in cigarette advertisements must be consistent with the latest applicable FTC tar number.

By direction of the Commission.

FEDERAL TRADE COMMISSION DECISIONS

IN THE MATTER OF

AMERICAN BRANDS, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8799. Complaint, Sept. 29, 1969 – Decision, Aug. 20, 1971

Consent order requiring a major cigarette manufacturer with headquarters in New York City to cease advertising that its cigarettes are low in tar without clearly disclosing material tar and nicotine content data; tar and nicotine content shall be determined by the testing methods employed by the Federal Trade Commission.

COMPLAINT*

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Brands, Inc., a corporation, hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent American Brands, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 245 Park Avenue, New York, New York.

PAR. 2. Respondent is now, and for some time last past has been engaged in the advertising, sale and distribution

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* Reported as amended by hearing examiner's order of October 24, 1969. Respondent's name was incorrectly stated in the complaint as 'The American Tobacco Company.'

of cigarettes including brands designated 'Pall Mall Gold' 100's, 'Pall Mall Menthol' 100's, and 'Lucky Filters.'

PAR. 3. Respondent transports and causes said cigarettes, when sold, to be transported from its places of business in the State of Virginia, and elsewhere, to purchasers thereof located in various other States of the United States and the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said cigarettes in commerce, as 'commerce' is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its aforesaid business, and for the purpose of inducing the purchase of its cigarettes, the respondent has made, and is now making numerous statements and representations in advertising including, but not limited to, advertisements broadcast on radio and television and inserted in magazines, newspapers and other advertising media with respect to the tar content of said cigarettes. Typical and illustrative of said statements and representations, but not all inclusive thereof are the following:

TELEVISION: Good Rich Flavor – Lower in 'Tar'.

RADIO: MAN: Here's good news for particular people * * * people who demand both – good taste and mildness from their cigarette. The newest U.S. Government figures show Pall Mall (Sic) Gold lower in tar than ever before. Lower in tar than the best selling filter king. You make out better at both ends with Big Tip Pall Mall (Sic) Gold. Tastier, Milder, Pall Mall (Sic) Menthol, too.

NEWSPAPERS: And the average puff gives you 26 percent less 'tar' than a non-filter cigarette.

By such statements and others of similar import comprising a comprehensive national advertising campaign and by failing to disclose facts which are material in the light of these statements and which consumers need to make an in-

formed judgment, respondent has represented and created the impression that its cigarettes are low in tar when in truth and in fact its Pall Mall Gold 100's and Lucky Filters contain approximately 20 and 21 milligrams of tar, amounts which rank them 56th and 77th higher among the 122 brands tested than the brand containing the lowest tar level of 4 milligrams.

PAR. 5. By representing its cigarettes as being low in tar when in fact they contain five times the amount of tar found in the lowest yielding brand tested and rank above the midpoint on a tar-yield spectrum running from a low of 4 milligrams to a high of 36 milligrams, respondent has engaged in and practiced falsehood and deception.

PAR. 6. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of cigarettes of the same general kind and nature as those sold by respondent.

PAR. 7. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's product by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on September 29, 1969, charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and respondent having been served with a copy of that complaint; and

The Commission having duly determined upon motion duly certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provisions of Section 2.34(d) of its rules, that the consent order procedure shall not be available after issuance of complaint; and

Respondent and counsel for the complaint having thereafter executed an agreement containing a consent order, an admission by respondent of all jurisdictional facts set forth in the complaint, a statement that the signing of the agreement by respondent is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent American Brands, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 245 Park Avenue, in the city of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent American Brands, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Stating in advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms, unless the statement is accompanied by a clear and conspicuous disclosure of:

1. The 'tar' and nicotine content in milligrams in the smoke produced by the advertised cigarette; and

2. If the 'tar' content of the advertised brand is compared to that of another brand or brands of cigarette, (a) the 'tar' and nicotine content in milligrams of the smoke produced by that brand or those brands of cigarette, and (b) the 'tar' and nicotine content in milligrams of the lowest yield domestic cigarette: *Provided*, That a comparison to a class of cigarettes, or to many or most of the cigarettes of a class, shall not be deemed a comparison to another brand or brands of cigarette.

II

For the purposes of Paragraph I of this order:

1. The term 'tar' shall mean the total particulate matter in the mainstream smoke of cigarettes as determined by the testing method employed by the Federal Trade Commission in its testing of the smoke of domestic cigarettes; and

2. The term 'nicotine' shall mean total alkaloids as nicotine in the mainstream smoke of cigarettes as determined by the testing method employed by the Federal Trade Commission in its testing of the smoke of domestic cigarettes.

III

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

FEDERAL TRADE COMMISSION

REPORT TO CONGRESS

Pursuant to the
Federal Cigarette Labeling and Advertising Act

For the Year 1979

* * *

Table 10 shows the percentage of total cigarette advertising expenditures used to promote longer (95-121 mm) cigarettes from 1967 through 1979. Advertising expenditures for these cigarettes remained at the 1978 percentage level, 34%, but the sales data from Table 4, which is repeated in Table 10, reveal that longer cigarettes increased their market share slightly to 32%.

Table 11, which has been discussed in the previous section, presents the percentage of total cigarette advertising expenditures used to promote cigarettes with FTC "tar" levels of 15 mg. or less, as well as the sales figures for these cigarettes. Since 1976, cigarette manufacturers have greatly increased the aggregate percentage of their advertising expenditures used to promote these cigarettes. The market share of these brands has also increased steadily since 1976. In 1979, cigarette manufacturers spent 66.9% of their advertising budgets to promote cigarettes with 15.0 mg. or less "tar". This represents an 18% increase over the 1978 level. Sales of these cigarettes also increased substantially, from 27.5% of total sales in 1978 to 40.9% in 1979.

For 1979, Table 11 also reports the market share and advertising expenditures for cigarettes with 12, 9, 6, and 3 mg. or less "tar". The percentage of total advertising expenditures devoted to these cigarettes greatly exceeded their market share. In 1979, cigarette manufacturer's spent an average

of 30.9% of their advertising budgets to promote the sale of cigarettes with 9.0 mg. or less "tar", but these cigarettes accounted for only 10.6% of total sales. Cigarettes falling in what advertisers sometimes call the "ultra low 'tar'" range of 3.0 mg.[8] accounted for less than 3% of total sales and 9.6% of the cigarette advertising expenditures.

Table 12 reports the weighted average "tar" and nicotine emissions of all cigarettes sold domestically, and enables the reader to assign the decline in those values which has taken place since 1968 to one of three factors:

(1) Brand switches among the varieties that had been on the market throughout 1968-1979;

(2) The lowering of the "tar" content of the varieties that had been on the market throughout 1968-1979; and

(3) Brand switches to varieties that were introduced after 1968.

The "A" columns show the weighted average "tar" and nicotine figures for all cigarettes sold in the U.S. from 1968 through 1979. These weighted averages are obtained by multiplying the total yearly sales figure for a given brand by that brand's respective "tar" and nicotine level. The resulting figures for each brand are then added together and divided by the total number of cigarettes sold domestically during the year in question. The "B" columns show these weighted averages only for those cigarette varieties which have been on the market from the year 1968 until the year indicated. Thus, these columns do not reflect the impact of new brands intro-

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[8] The FTC has not defined "ultra-low tar", or any term related to "tar" level except for "low tar", which the FTC defines as 15.0 mg. or less tar. As a result advertisers use a variety of terms to distinguish among "tar" levels.

duced after 1968. Finally, the "C" columns report on the same cigarettes considered in the "B" columns, but assume that the "tar" and nicotine values of these cigarettes had remained constant since 1968. Thus, figures in column "C" provide an indication of what the weighted average would have been if the "tar" and nicotine figures of individual cigarette varieties had not changed since 1968 and if no new varieties had been introduced after 1968.

FEDERAL TRADE COMMISSION

REPORT TO CONGRESS

Pursuant to the
Federal Cigarette Labeling and Advertising Act

For the Year 1980

DATED: November 15, 1982

* * *

Table 11, which has been discussed in the previous section, presents the percentage of total cigarette advertising expenditures used to promote cigarettes with "tar" levels of 15 mg. or less, as well as the sales figures for these cigarettes. Since 1967 the percentage of cigarette advertising expenditures devoted to promoting sales of low "tar" cigarettes has increased dramatically from 5.5% to 65.1%. (The 65.1% figure for 1980 represents a slight decline from the 66.9% spent in 1979.) The market share of these low "tar" brands has increased steadily from 2% in 1967 to 44.8% in 1980. Between 1979 and 1980 there was an increase of nearly 4% in market share.

Table 11 also reports the market share and advertising expenditures for cigarettes with 12, 9, 6, and 3 mg. or less "tar". The percentage of advertising expenditures for cigarettes in each of these categories increased from 1979 to 1980. However, the percentage of advertising expenditures devoted to these cigarettes greatly exceeded their market shares. In 1980, cigarette manufacturers spent an average of 39.7% of their advertising budgets to promote the sale of cigarettes with 9 mg. or less "tar", but these cigarettes accounted for only 16.8% of total sales. Cigarettes in what advertisers sometimes call the "ultra low 'tar'" category of 3

mg. or less[11] accounted for only 3.3% of total sales, but over 15% of cigarette advertising expenditures.

[11] The FTC has not defined "ultra-low 'tar'", or any term related to "tar" level except for "low 'tar'", which the FTC defines as 15.0 mg. or less "tar." As a result advertisers use a variety of terms to distinguish among "tar" levels.

FEDERAL TRADE COMMISSION

[59 Fed. Reg. 51980 (Oct. 13, 1994)]

[File No. 932-3368]

The American Tobacco Company; Proposed Consent Agreement With Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, a Stamford, Connecticut based company from disseminating ads for Carlton or any other cigarettes that represent that consumers will get less tar or nicotine by smoking any number of cigarettes of any of its brands than by smoking one or more cigarettes of any other brand, unless such representations are both true and substantiated by competent and reliable scientific evidence.

DATES: Comments must be received on or before December 12, 1994.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th Street and Pennsylvania Avenue NW., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT:
C. Lee Peeler or Shira D. Modell, FTC/601 Bldg. – Rm. 4002, Washington, D.C. 20580. (202) 326-3090 or (202) 326-3116.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following

consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Agreement Containing Consent Order To Cease and Desist

In the matter of: The American Tobacco Company, a corporation.

The Federal Trade Commission having initiated an investigation of certain acts and practices of The American Tobacco Company, a corporation, and it now appearing that The American Tobacco Company, a corporation (hereinafter sometimes referred to as "proposed respondent"), is willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

It is hereby agreed by and between The American Tobacco Company, by its duly authorized officer, and counsel for the Federal Trade Commission that:

1. Proposed respondent The American Tobacco Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 281 Tresser Boulevard, in the City of Stamford, State of Connecticut.

2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed respondent waives:

a. Any further procedural steps;

b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

d. All claims under the Equal Access to Justice Act.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft of complaint here attached, or that the facts as alleged in the draft complaint, other than jurisdictional facts, are true.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the

proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the proposed complaint and order contemplated hereby. Proposed respondent understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

[51981]

Order

I

It is ordered that respondent, The American Tobacco Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale or distribution of any cigarette in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, through the presentation of the tar ratings of any of respondent's brands of cigarettes as a nu-

merical multiple, fraction or ratio of the tar of any other brand of cigarettes, and/or the visual depiction of ten packs or a carton of any of respondent's brands versus one pack of any other brand, directly or by implication, that consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. of tar than by smoking a single pack of any other brand of cigarettes that is rated as having more than 10 mg. of tar. For purposes of this Order, the term "cigarette" shall be as defined in Section 1332 (1) of Title 15 of the United States Code.

II

It is further ordered that respondent, The American Tobacco Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale or distribution of any cigarette in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, through the presentation of the tar or nicotine ratings of any of respondent's brands of cigarettes as a numerical multiple, fraction or ratio of the tar or nicotine ratings of any other brand of cigarettes, and/or the visual depiction of more than one pack of any of respondent's brands versus one pack of any other brand, directly or by implication, that consumers will get less tar or nicotine by smoking any number of cigarettes (or packs or cartons of cigarettes) of any of respondent's brands than by smoking one or more cigarettes (or packs or cartons of cigarettes) of any other brand, unless such representation is true and, at the time of making such representation, respondent possesses and relies upon component and reliable scientific evidence that substantiates the representation. For purposes of this Order, "component and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has

been conducted and evaluated in any objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III

It is further ordered that presentation of the tar and/or nicotine ratings of any of respondent's brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that respondent's brand is "low," "lower," or "lowest" in tar and/or nicotine) shall not be deemed to constitute a numerical multiple, fraction or ratio and shall not, in and of itself, be deemed to violate Paragraph I or II of this Order where no more than a single cigarette or pack of respondent's brand is visually depicted versus a single cigarette or pack of any other brand.

IV

It is further ordered that for five (5) years after the last date of dissemination of any representation covered by this Order, respondent or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

V

It is further ordered that respondent shall distribute a copy of this Order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements,

promotional materials, product labels or other such sales materials covered by this Order.

VI

It is further ordered that respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this Order.

VII

It is further ordered that respondent shall, within sixty (60) days after service of this Order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from The American Tobacco Company ("American Tobacco').

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter concerns claims made by American Tobacco in its advertising for cigarettes.

The Commission's complaint in this matter charges American Tobacco with engaging in unfair or deceptive prac-

tices in connection with the advertising of its Carlton brand cigarettes. According to the complaint, American Tobacco falsely represented, through the presentation of the tar of its Carlton product as a numerical multiple, fraction or ratio of the tar of other brands of cigarettes, and/or the visual depiction of ten packs or a carton of Carlton cigarettes versus one pack of the other brands: (1) That consumers will get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads, which are rated as having more than 10 mg. of tar; and (2) that it had a reasonable basis for claims that consumers will get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads.

The consent order contains provisions designed to remedy the violations charged and to prevent American Tobacco from engaging in similar deceptive and unfair acts and practices in the future.

[51982]

Part I of the order prohibits American Tobacco from representing, through certain means specified in the order, that consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. of tar than by smoking a single pack of any other brand of cigarettes that is rated as having more than 10 mg. of tar.

Part II of the order prohibits American Tobacco from representing, through those same means, that consumers will get less tar or nicotine by smoking any number of cigarettes (or packs or cartons of cigarettes) of any of respondent's brands than by smoking one or more cigarettes (or packs or cartons of cigarettes) of any other brand, unless, the representation is true and, at the time it makes such claims, American Tobacco has competent and reliable scientific evidence to substantiate the claims.

Part III of the order provides a limited "safe harbor" for advertising that complies with certain specific requirements in its use of official tar and nicotine ratings. Specifically, presentation of the tar and/or nicotine ratings of any of American Tobacco's brands of cigarettes and the tar and/or nicotine ratings of any other brand shall not, in and of itself, be deemed to violate Part I or Part II of the order where no more than a single cigarette or pack or American Tobacco's brand is visually depicted versus a single cigarette or pack of any other brand.

Part IV of the order requires American Tobacco to maintain copies of all materials relied upon in making any representations covered by the order, as well as all materials that contradict or call into question those representations.

Part V of the order requires American Tobacco to distribute copies of the order to each of its operating divisions and to various officers, agents, representatives or employees of American Tobacco.

Part VI of the order requires American Tobacco to notify the Commission of any changes in corporate structure that might affect compliance with the order.

Part VII of the order requires American Tobacco to file with the Commission one or more reports detailing compliance with the order.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order, or to modify any of their terms.

Donald S. Clark,
Secretary.

[FR Doc. 94-25333 Filed 10-12-94; 8:45 am]

FEDERAL TRADE
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DEC 18 1970
SECRETARY

THE TOBACCO INSTITUTE, INC.
1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20006

296-8434

HORACE R. KORNEGAY
PRESIDENT & EXECUTIVE DIRECTOR

Federal Trade Commission December 17, 1970
Washington, D.C. 20580

Gentlemen:

In accordance with the Commission's Press Release of October 1, 1970, requesting cigarette manufacturers to advise the Commission exactly how they voluntarily intend to disclose "tar" and nicotine content in cigarette advertising under a voluntary program, I am pleased to transmit to the Commission the enclosed letter, which constitutes a revision of the letter and memorandum forwarded to the Commission on October 23, 1970, signed by Brown & Williamson Tobacco Corporation; Larus & Brother Company, Inc., Trading as The House of Edgeworth; Liggett & Myers Incorporated; Lorillard, a Division of Loew's Theatres, Inc.; Philip Morris U.S.A.; R. J. Reynolds Tobacco Company; Stephano Brothers; and United States Tobacco Company.

The companies are aware of the Commission's view, as expressed in the Press Release, by Chairman Miles W. Kirkpatrick, that "A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately."

In submitting the program embodied in the enclosed letter on behalf of these companies, I have been directed to state further on behalf of each of them that it is not to be considered an admission that the Federal Trade Commission is authorized to promulgate a trade regulation rule, or that this voluntary program may be included for any purpose in any public hearing held on the Federal Trade Commission's proposal of August 8, 1970, or any like proposal.

While each company will fully adhere to the voluntary program submitted, it does not by doing so admit that the failure affirmatively to disclose in its advertising any "tar" and nicotine test results, which the Federal Trade Commission from time to time determines and publishes, constitutes a violation of law.

I understand that Liggett & Myers Incorporated is writing a separate letter to the Commission explaining the basis upon which it is a signatory to the voluntary proposal submitted.

In order to facilitate the Commission determination, I am enclosing a memorandum of some explanatory material and facts underlying the provisions of the proposed voluntary program.

Very truly yours,
/s/
Horace R. Kornegay

Enclosures

FEDERAL TRADE COMMISSION
RECEIVED
DEC 18 1970
SECRETARY

December 17, 1970

Federal Trade Commission
Washington, D.C. 20580

Gentlemen:

In accordance with the Commission Press Release of October 1, 1970, each of the undersigned companies which manufactures, or is a primary distributor of, varieties of cigarettes which are presently advertised, and any of its subsidiaries similarly engaged, is writing to set forth a voluntary program for the disclosure of "tar" and nicotine in its paid consumer-directed cigarette advertising in the United States placed by each of the undersigned companies.

Under this program, each company will disclose clearly and prominently for the variety of cigarettes advertised the values for "tar" in milligrams and for nicotine in tenths of a milligram contained in the Federal Trade commission published test results, under its present methodology, in all advertising in newspapers, magazines, and other periodicals published and distributed in the United States, including newspapers, magazines, and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, in advertisements appearing on billboards in the United States, in advertisements printed on handbills and in direct mail circulars that are distributed to consumers in the United States, and in advertisements on signs, displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period.

Each of these advertisements will include the "tar" and nicotine data, as rounded off by the Federal Trade Commis-

sion, from the Commission test results most recently published in the Federal Register. However, in order to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, each company may use the "tar" and nicotine data from the published Commission test results covering the test prior to the most recently published test, in lieu of the most recently published test results, (a) in all advertising in those issues of newspapers, magazines, and other periodicals for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type to the production house, is less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (b) in all advertising printed on handbills and in direct mail circulars which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (c) in all advertising appearing on billboards which is delivered in final form to the printer, or is painted or assembled, less than thirty working days after publication of the most recently published Commission test results in the Federal Register; and (d) in all advertising printed on signs displayed inside of stores and other places of business selling cigarettes, which is reasonably not expected to be exposed to the public beyond a six month period, which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register.

The disclosure will be in the following language:

_____ mg. "tar", _____ mg. nicotine
av. per cigarette, FTC Report (date).

Necessarily, the carrying out of this voluntary program is predicated upon the Commission continuing to test the adver-

tised varieties of cigarettes and to publish its results in the Federal Register at regular and periodic intervals of not more than six months.

Where the most recent Commission published test results do not include a variety then manufactured or primarily distributed and advertised by any company, that company will disclose in its advertising, until Commission test results on that variety are next published, the "tar" and nicotine values determined by that company in its own "tar" and nicotine test on that variety conducted in accordance with the present Federal Trade Commission methodology. In the interval prior to the publication of Commission test results, that company will utilize the following language:

_____ mg. "tar", _____ mg. nicotine
av. per cigarette by FTC method.

If at any time any company undertakes the manufacture or the primary distribution of a new variety of cigarettes to be advertised, it will under this program disclose in its advertising the "tar" and nicotine values determined by that company in its own "tar" and nicotine tests on that new variety conducted in accordance with the present Federal Trade Commission methodology, when it begins the advertising of that new variety.

In the event that any company determines from test data that the "tar" or nicotine value of any of its varieties available to consumers has become larger or smaller by more than twenty percent of the most recently published rounded Commission test results, that company may request the Commission to conduct a special test on such variety based upon a sample of cigarettes picked up in the marketplace by Western Union, in accordance with arrangements between the Commission and Western Union, with the requesting company bearing all costs of such a pick-up. The requesting company may simultaneously with its request to the Commission, also request the Tobacco Institute Testing Laboratory to obtain

from Western Union a similar market pick-up of the variety. If within forty-five working days after the company's request to the Commission, the Commission supplies the company with its test results, the company will thereafter utilize those test results in advertising placed after that date in accordance with this program. If the Commission does not supply test results within forty-five working days, then the company will utilize, in accordance with this program, test results of the Tobacco Institute Testing Laboratory on the market sample until such tine as the Commission test results are made available to it.

The submission or the carrying out of this program does not constitute an admission by any company that "tar" and nicotine have any significance in relation to human health.

Each of these companies is confident that the program presented, which they intend to begin thirty working days after the Commission has considered it in lieu of any formal Trade Regulation Rule proceeding and hearing, constitutes a plan that is feasible.

Respectfully submitted,

BROWN & WILLIAMSON TOBACCO CORPORATION

By /s/_____
Addison Yeaman,
Executive Vice President

LARUS & BROTHER COMPANY, INC., TRADING AS THE HOUSE OF EDGEWORTH

By /s/_____
W. Brooks George,
Chairman of the Board

LIGGETT & MYERS INCORPORATED

By /s/_____
Milton E. Harrington,
President

LORILLARD, a Division of Loew's
Theatres, Inc.

By /s/_____
Curtis H. Judge, President

PHILIP MORRIS U.S.A.

By /s/_____
Ross R. Millhiser, President

R.J. REYNOLDS TOBACCO COMPANY

By /s/_____
Colin Stokes, Chairman of
the Board

STEPHANO BROTHERS

By /s/_____
Constantino Stephano

UNITED STATES TOBACCO COMPANY

By /s/_____
L.A. Bantle, President

FEDERAL TRADE COMMISSION
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December 17, 1970

EXPLANATORY MEMORANDUM RELATING TO VOLUNTARY PROGRAM FOR "TAR" AND NICOTINE DISCLOSURE

The following memorandum is intended to provide some explanatory material relating to various portions of the letter of December 17, 1970, forwarded to the Commission by eight cigarette manufacturers.

ADVERTISING COVERED

This program is applicable to cigarette advertising in newspapers, magazines, and other periodicals; as well as advertising on billboards, on handbills, and in direct mail circulars; and on signs displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period. Certain promotional or display items such as ashtrays, cigarette lighters, decals, display units, and pencils imprinted with cigarette advertising, are not included because there is no practical way to change "tar" and nicotine figures thereon, were they used on these items, to reflect changes in the "tar" and nicotine content of the variety of cigarette mentioned. Many items of this nature pass from the control of the company concerned or are semi-permanent and may last for a number of years. If such items were included in this program, this would lead to the presence of old, and perhaps inaccurate figures being presented to consumers, and consumer confusion would be engendered by the conflict between those figures and current figures being advertised.

In order to eliminate any possible confusion, the term "billboards" shall mean:

(1) Media billboard advertising messages on the following structures exposed to the general public:

2-30 Sheet Billboards;
Painted Billboards;
Spectacular Billboards; and

(2) Advertising messages on the following structures or transportation vehicles exposed to the general public:

Trucks;
Public Transit Vehicles;
Transit Station Platforms;
Transportation Terminals.

A sign on a plant, warehouse or other facility related to the manufacture of cigarettes, which identifies such plant, warehouse or facility is not considered a billboard within this program.

LEAD TIME

All advertisements must be submitted in advance of their publication date by some period of time, usually called the lead time, which varies from periodical to periodical. This lead time is several weeks for some periodicals and several months for others. Necessarily, when the Commission publishes a new report of test results on June 1st, it is physically impossible for the figures included in that report to appear in June and July advertisements in some periodicals. A workable solution is provided to this problem in order to make this voluntary program capable of practical implementation in the light of requirements dictated by the mechanics of publishing and advertising.

Any workable solution to this problem must inescapably utilize ascertainable dates when definable acts must take place. The program does this. It utilizes publication in the Federal Register of the Commission test results as a starting date, which is definitely ascertainable, and it employs dates such as closing date and delivery in final form to the printer

in order that it can be precisely determined when the time period terminates. These dates of delivery to the printer and closing date were, selected, rather than the date of the appearance of the periodical in homes or on newsstands, or the date on the cover of a periodical, because the dates specified are the times at which control over the advertising passes from the hands of the cigarette company.

In employing the date of publication of the Commission test results in the Federal Register, it is recognized that the company advertising cannot as a practical matter require the Commission to publish its results in the Federal Register. It is anticipated, however, that the Commission will accept the responsibility regularly, and at not more than six month intervals, to publish its results in the Federal Register.

In the case of billboards, handbills, and direct mail circulars, in addition to complying with the lead time requirements, each company will use its best efforts to have "tar" and nicotine figures appearing based upon published Commission test results as recent as practically possible.

THE LANGUAGE OF THE DISCLOSURE

The legends set forth in the program for disclosing "tar" and nicotine are intended to supply sufficient information to explain the source and nature of the "tar" and nicotine figures disclosed without confusing the consumer. An abbreviation for the word average is included to make it clear that the FTC figures are not based on testing individual cigarettes, but are instead averages of the averages obtained by smoking five cigarettes on each or twenty ports.

In the first legend, relating to a Commission market pick-up, the FTC Report, from which the "tar" and nicotine figures are taken is to be identified by its date in the form of an abbreviation of the month and year, e.g., Jan. '71.

CONTINUATION OF COMMISSION TESTING

This entire program is predicated upon the continued testing by the Federal Trade Commission at regular and periodic intervals of approximately ~~4-6 months~~. Obviously if the Commission should, for some reason, totally discontinue its testing operations, or fail to conduct and publish new test results at least six months after an earlier test has been published, then it would be uninformative to consumers if each company continued to use the old, out-dated figures obtained in an earlier Commission test.

THE COMMISSION'S FAILURE TO TEST AN EXISTING VARIETY

Cigarette companies sometimes market certain varieties in only a few localities, or in relatively small quantities. Under the current system of Commission pickup of market samples, a situation might occur in which the Commission failed to pick up any cigarettes of an advertised variety or a sufficient number to permit testing.

The program provides that in such cases each company may conduct its own tests in accordance with the present Commission methodology and in the interim utilize the results of its tests in advertising. This provision is necessary because no company will have control over the Commission testing, and it is of course possible that the Commission may, for some reason, fail to test cigarettes of one or more advertised varieties. It is not reasonable that such a failure on the part of the Commission should effectively preclude advertising of that variety because of the absence of Commission "tar" and nicotine figures. It is only to avoid this possibility that the company concerned may use its own test results on existing varieties. It is to be emphasized, however, that it is extremely unlikely as a practical matter that with an organized Commission testing program the Commission would ever fail to test one or more existing varieties.

NEW VARIETIES

Cigarette companies sometimes begin marketing new varieties of cigarettes to respond to various consumer demands and other marketing factors. The effective marketing of these new varieties requires that "tar" and nicotine figures for those varieties be obtained in a very prompt way which will not require time consuming procedures to protect information believed by the cigarette company to be a trade secret and commercially valuable. The program provides an effective procedure in that situation by disclosure of "tar" and nicotine on the basis of the company's own testing in accordance with the Commission methodology until the next Federal Register publication.

CHANGES IN THE "TAR" AND NICOTINE CONTENT IN VARIETIES OF CIGARETTES

The "tar" or nicotine content of some varieties of cigarettes may change from time to time. Sometimes these changes are relatively small and at other times these changes may represent a substantial percentage of the preceding "tar" and nicotine figures. Some of these changes are the result of a decision of a cigarette company to alter cigarette design or formulation, as, for example, the use of a longer filter. Other changes may be the result of variations in tobacco crops which cannot be controlled. The program provides a suitable procedure to be used in connection with these changes when they are significant in order to make available to consumers test results which are more current than those earlier published. During the period until more current test results are available, the company will utilize the latest published Commission test results.

COMMENCEMENT

Thirty working days, i.e., the lead time, are required for this program to become effective after its consideration by the Commission. This means that if notice of Commission consideration is received on December 22, for example, then

"tar" and nicotine data will be included in all advertising placed more than thirty working days after December 22 in accordance with this program.

[SEAL]
THE CHAIRMAN

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

The Honorable Thomas A. Luken
Chairman
Subcommittee on Transportation, Tourism,
and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Bob Whittaker
Ranking Republican Member
Subcommittee on Transportation, Tourism,
and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Messrs. Luken and Whittaker:

Thank you for your letter of July 6, 1988 raising certain additional questions concerning our letter of June 17, 1988, commenting on the provisions of H.R. 4543, The Cigarette Testing and Liability Act of 1988. The Commission appreciates the opportunity to provide additional comments on the important issues raised by your proposed legislation.

You first asked how many tests would have to be conducted each year to establish a credible threat of a test to verify the validity of a cigarette company's own test figures. The Commission believes that, for tar and nicotine test figures, random testing of a very small number of brand varieties would establish a very credible threat of detection of in-

accurate tar and nicotine information currently being disclosed to consumers.[1]

There are, however, three major differences between the testing proposed by H.R. 4543 and the industry's existing, voluntary tar and nicotine disclosure program. Although H.R. 4543 appears to envision testing constituents beyond tar, nicotine and carbon monoxide there is currently no standardized testing protocol for testing such constituents. It is impossible to verify testing results without agreement on a precise protocol for the testing.[2]

Second, assuming that such a uniform testing protocol that would produce replicable results (that is, results that would not differ significantly from test to test) were established, H.R. 4543 imposes no legal obligation on the companies to test for any constituent or disclose this information to the government or consumers.[3] Similarly, there is no current

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[1] As indicated in the Commission's May 7, 1988, testimony before this Subcommittee, there are other factors that help insure the accuracy of current tar and nicotine data. Each of the major cigarette companies either has a laboratory of its own or has access to a laboratory to do tar and nicotine assays. Because tar and nicotine ratings are an area of intense competition within the industry, we expect that if a company were to publish incorrect ratings, we would hear quickly from its competitors. Indeed, the Brown & Williamson case arose not as a result of Commission testing or monitoring but because of competitors' complaints.

[2] A testing protocol that was designed to simply identify the presence or absence of constituents or whether certain constituents were present in an unusually high amount presumably would be easier to establish than one which seeks to both identify and rank them in its present form. H.R. 4543 appears to envision quantitative testing.

[3] We therefore assumed in our prior comment that the Subcommittee intended the Commission to test a much broader sample of brand varieties than would be needed simply to verify industry reported figures.

program for voluntarily disclosing information on tobacco constituents beyond tar and nicotine to consumers.

Third, the present tar, nicotine and carbon monoxide testing program is limited to the six major cigarette companies, whose sales are estimated to encompass over 99% of the U.S. market. It is impossible to judge how accurate the results of other smaller and less sophisticated manufacturers and importers would be in the event they were required to disclose this information.[4]

Assuming these three differences could be corrected, however, there is no reason why random testing of a very small sample of brand varieties would not establish a sufficient deterrent to inaccurate constituent reporting.[5]

You next ask whether the data that would be generated by the testing required under Section 2 of the bill would be useful in future advertising enforcement actions by the Commission. As indicated previously, because current cigarette advertising does not disclose constituent information beyond tar and nicotine,[6] and the proposed legislation does

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[4] Significantly, however, the current agreement among industry members for testing of tar, nicotine, and carbon monoxide by the Tobacco Institute Testing Laboratory ("TITL") allows any non-participating company to obtain testing on payment of a user fee. Testing done in the TITL labs would not raise the same verification concerns as independent testing done by small manufacturers and importers.

[5] The Commission has already indicated that random testing is one method that it can use to verify the results of industry-generated tar, nicotine and carbon monoxide figures. See Prepared Statement of Federal Trade Commission on Cigarette Tar and Nicotine Testing, Before the Subcommittee on Transportation, Tourism and Hazardous Materials, May 7, 1987.

[6] The commission's 1981 Staff Report on Cigarette Advertising recommended that Congress consider requiring disclosure of carbon monoxide, and in September 1982 the Director of the Commission's Bureau of

[Footnote continued on next page]

not require such disclosure, it is unclear to us how such information would be useful in future advertising enforcement actions.[7]

Incidentally, we want to correct the record with respect to the Subcommittee's apparent assumption that because the Commission has not challenged the advertisements of any cigarette brand since 1983, it has not taken any enforcement action involving unfair or deceptive advertising in the cigarette industry during that period. As we believed the Subcommittee was aware, the Commission is currently engaged in litigation with R.J. Reynolds Tobacco Company over a question involving cigarette advertising.[8]

You have also requested that the Commission submit additional comments on Section 2 of the bin, particularly addressing any evidence on the extent to which the current costs of smoking would be reduced by providing consumers with the additional testing data called for in Section 2. The staff has reviewed the written statements cited in your letter. Each of these statements, to a greater or lesser degree, bases its support for Section 2 of H.R. 4543 on the premise that accu-

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[Footnote continued from previous page]

Consumer Protection endorsed legislation requiring disclosure of tar, nicotine and carbon monoxide on cigarette packages. See Letter from Timothy J. Muris, Director, Bureau of Consumer Protection, to The Honorable John D. Dingell, Chairman, House Committee on Energy and Commerce, at 22 (September 1, 1982). Congress has never enacted such a requirement.

7 In that regard, we note that the Surgeon General and the National Cancer Institute have already identified several thousand constituents of tobacco smoke but have not indicated any specific constituents beyond tar, nicotine and carbon monoxide that they believe should be reported separately.

8 We, of course, express no opinion on the merits of this litigation.

rate comparative data on tar, nicotine and carbon monoxide content will no longer be available in light of the Commission's decision to close its cigarette testing laboratory.[9] As we explained in our June 17th letter, that is not the case. Comparative tar, nicotine and carbon monoxide figures continue to be generated by the Tobacco Institute Testing Laboratory under a well established methodology. The Commission, through a staff contractor, has unrestricted access to the laboratory to monitor the testing procedure, and in addition, the FTC can verify TITL test results through random testing by a contract laboratory. The industry, in addition, is reporting this information to the Commission, and the Commission will continue to report it to Congress on a regular basis, as it has for many years.

In addition to concerns about continued availability of accurate comparative tar, nicotine and carbon monoxide test data, Dr. Munzer of the American Lung Association testified that the testing program called for by H.R. 4543 was neces-

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[9] See, e.g., Statement of Steven D. Stellman at 3-4 (June 8, 1988) ("I wish to stress the importance of the FTC data collection program to basic research on smoking related disease. . . . [W]e fear that our ability to continue to provide such analytic data, such as our ability to relate differences in cancer mortality to cigarette yield, will be hampered by the absence of reliable and routinely available data on the relative exposures of people smoking different brands."); Statement of Robert E. McAfee, M.D. at 2 (June 8, 1988) ("We believe that the government should again measure cigarette smoke so that, at the very least, a smoker will be aware of the harmful constituents being emitted from cigarettes and how one cigarette type compares with another."); Statement of Alfred Munzer, M.D. at p. 5 (June 8, 1988) ("Second, tasting limited to tar and nicotine tells us nothing about carbon monoxide yields of different cigarettes."); Statement of Scott D. Ballin, at 2-3 (June 8, 1988) ("Cigarettes advertised as low tar or low nicotine may have high levels of carbon monoxide and other harmful constituents; yet cigarette companies do not provide consumers or the government with this information and the government currently has no way of obtaining or requiring disclosure of this information".)

sary because of concerns about compensatory smoking, concerns about possible alteration of cigarette smoke constituents in low tar cigarettes, and the belief that current tar and nicotine data is deceptive unless accompanied by a full listing of the relative levels of the other constituents in tobacco smoke. Additionally, Mr. Ballin of the American Heart Association expressed concerns that the full listing of chemical additives to tobacco is currently unknown.

With respect to concerns expressed about compensatory smoking, the Commission shares the Subcommittee's concern about studies of the effects of compensatory smoking that raise questions about how consumers perceive and use existing tar and nicotine information. This issue is a long-standing one that was reviewed by the Surgeon General in 1981, was examined in the FTC's litigation with Brown & Williamson, and has been raised in connection with the staff's ongoing review of the current testing methodology. Although the existence of compensatory smoking behavior is now well established, a method of adjusting the current testing methodology to reflect it has proved elusive. To date, no cigarette company, scientific agency, or health group has offered the Commission a viable alternative to the present testing system. As indicated in our June 17th letter, however, the Commission staff is currently awaiting the results of a Department of Health and Human Services study on how consumers perceive and use existing data. That study may provide the basis for future recommendations in this area.

The second general concern expressed by Dr. Munzer is that changes in cigarette manufacturing technology designed to lower the tar level of cigarettes may have introduced new constituents into cigarette smoke or harmfully altered previously existing cigarette smoke constituents. This question seems to raise scientific issues that are beyond the scope of a routine constituent testing program administered by a law enforcement agency. Routine random testing by its very nature would seek to determine the amounts of a specific list of

constituents, not to test for the presence of new constituents. Similarly, it seems premature to begin random testing of relative levels of constituents until there is consensus as to what constituents should be tested and what levels are of concern.[10]

With respect to concern about tobacco additives, the Comprehensive Smoking Education Act already requires cigarette manufacturers to provide the Secretary of Health and Human Services with a list of the ingredients added to tobacco.[11] Under the statute, the ingredients list does not identify the supplying company or the brand of cigarette,[12] and the information is expressly non-public.[13] If the Subcommittee determines that disclosing tobacco additive information would have an impact on consumer purchasing decisions, the most logical first step would be to amend the current federal law to delete the provision which prohibits the Secretary of Health and Human Services from disclosing the information that is already reported and, if necessary, require that the information be reported on a brand variety basis.

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10 We note that the agency charged by law with responsibility for conduct and support of research on the effect of smoking on human health, the Department of Health and Human Services, reports spending $3 million on "identification of harmful constituents in tobacco smoke." We question whether additional research is necessary, or whether that research could be conducted with existing funding. See, U.S. Department of Health and Human Services, Prevention 86/87 (1987) at 154.

11 15 U.S.C. 1335a.

12 15 U.S.C. 1335a(a).

13 15 U.S.C. 1335a(b)(2)(A) (The Secretary is required to report to Congress information pertaining to any such ingredient judged to be a health risk and may otherwise make the list available to Congress if it is requested by a subcommittee or committee).

Our June 17th letter also expressed the concern that it could potentially cost millions of dollars for the Commission to produce, through testing, the comparative listing of tobacco additives and constituents that may be envisioned by Section 2, and that there was no mechanism for distributing this information to consumers even if it were produced.[14] Similarly, we expressed our concern that consumers would find using a comparative listing of thousands of tobacco constituents (such as "Butylamine" and "Diethylamine") impractical and cited testimony by Dr. Guerin that cigarettes would remain in roughly the same ranking even after this analysis. Indeed, according to Dr. Guerin, if consumers used such information to select a cigarette that was relatively low in a specific commonly known constituent such as ammonia, but had a higher overall tar level, they might actually be injuring their health.

In short, the Commission shares the Subcommittee's concern about the health costs associated with smoking. The government already spends millions of dollars to correct this problem, and it is important in this area as in all others to ensure that our expenditures will obtain the intended results.[15] As indicated in our June 17th letter, to the extent that the intent behind Section 2 of H.R. 4543 is to provide consumers

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14 It is also unclear whether simple reporting of test results of a random sample of brand varieties would provide useful information to consumers. Although the FTC publishes tar and nicotine results for all varieties, consumers are exposed to this information primarily from voluntary tar and nicotine disclosure in all cigarette advertising and on some packaging.

15 The exact expenditures on smoking and health issues is apparently unknown, although the Department of Health and Human Services alone reports spending $40.5 million in 1986 on "smoking control." U.S. Department of Health and Human Services, Prevention '86/87 (1987) at 158. Of this amount $3.7 million is reported to have been spent on "identification of harmful constituents in tobacco smoke." Id. at 159.

with additional information about the constituents of cigarettes, we continue to believe that the most efficient means is simply to identify the constituents involved and require the cigarette companies to disclose this information on the labeling for cigarettes, rather than providing a taxpayer-subsidized Federal testing program to supply this information.

Your final question relates to the preemption provision of the bill. Referring to the advertising expenditure figures contained in the Commission's 1986 Cigarette Report to Congress, you ask whether Congress should permit state and local governments to regulate cigarette advertisements in newspapers, magazines, on billboards or other outdoor structures, on transit vehicles, and at point-of-sale. You ask, specifically, whether Section 3 of the bill would have varying effects on these different types of advertising. You further ask what impact there would be on these types of advertising if Congress prohibited additional, non-federal cigarette warning labels but otherwise gave state and local governments the power to regulate cigarette advertising and promotion.

The impact of proposed Section 3 of H.R. 4543 would clearly vary depending upon the type of advertising. Newspapers and magazines are often distributed across state lines and are frequently distributed nationally. For such advertising, complying with individual state health warning or affirmative disclosure requirements could serve as a functional ban on advertising. Transit advertising also can cross state lines; however, the geographical distribution is obviously more certain and limited, making it more possible to comply with different state health warning and affirmative disclosure requirements so long as the states do not themselves impose mutually inconsistent requirements. This would, however, leave open the concern of whether the state warnings are inconsistent with or otherwise undermine the Surgeon General's warnings.

Outdoor billboard advertising and point-of-sale advertising are obviously fixed in a particular geographic location and, therefore, are sore suitable for state regulation. Even for these media, however, the possibility of inconsistent or conflicting state and Federal warnings remains.

With regard to the question of legislation prohibiting non-federal cigarette warning labels, but otherwise giving state government the power to regulate cigarette advertising, the effect would again vary based on the type of advertising and regulation. For advertising that is interstate in nature, allowing such regulation could result in circumstances in which a single state imposes its decisions on citizens of other states or the entire country. For example, if one state were to decide that it is deceptive, per se, to advertise the tar, nicotine and carbon monoxide content of low tar cigarettes, that decision might operate to prohibit those disclosures in magazine and newspaper advertising in other states. Similarly, if a state prohibited cigarette transit advertising, that decision would presumably act to ban transit advertising in surrounding states if the vehicles cross into those neighboring states. Finally, such a revision would not end the potential for significantly inconsistent results. For example, if one state determined that tar, nicotine and carbon monoxide figures were per se deceptive, while another state determined that disclosure of these data should be required in all cigarette advertising, advertisers would be faced with an irreconcilable conflict for advertising that appeared in both states. We believe that results such as these are very real possibilities, and urge the Subcommittee to carefully analyze the potential results of this proposal.

I hope that you will find this information helpful to your consideration of H.R. 4543.

By direction of the Commission,*

Daniel Oliver
Chairman

* Chairman Strenio dissenting. He will forward his views to the sub-committee separately.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil Action No.
-vs-	)	99-CV-02496 (GK)
PHILIP MORRIS, INC.,	)	
et al.,	)	
Defendants.	)	

VOLUME I

Tuesday, July 30, 2002

9:09 a.m.

30(b)(6) videotaped deposition of C. LEE PEELER, held at law offices of Collier, Shannon, Scott, 3050 K Street, N.W., Suite 400, Washington, D.C., before Judith L. Leitz, a Registered Professional Court Reporter and Notary Public of the District of Columbia.

* * *

[Page 10, Line 1 through Page 21, Line 23]

VIDEO TECHNICIAN: My name is Jonathan Perry, I will be operating the video equipment for this deposition. My address is 642 A Street, Southeast, Washington, D.C. I am self-employed today representing Spherion Reporting, 1120 G Street, Northwest, Washington, D.C.

This deposition is being taken in Case No. 99-CV-02496 (GK) entitled the United States of America versus Philip Morris, Incorporated, et al., in the U.S. District Court for the District of Columbia.

The name of the witness is C. Lee Peeler.

Today's date is July 30th, 2002.

We are at the offices of Collier Shannon Scott, 3050 K Street, Northwest, Washington, D.C.

The time on the video screen is currently 9:10 and 46 seconds a.m.

The court reporter is Judith Leitz also with the firm of Spherion Reporting.

I'll now ask counsel present to please introduce themselves and state whom they represent.

MR. WAGNER: I'm Jeff Wagner and I'm here with Melanie Radler and Joe Franklin. We represent Philip Morris.

MR. GRAY: Richard Gray from Shook, Hardy & Bacon representing Lorillard Tobacco Company.

MR. BAILEY: Bill Bailey from Collier Shannon Scott with R.J. Reynolds.

MR. WILLIAMS: John Williams also with Collier Shannon Scott on behalf of Reynolds.

MS. OLDHAM: Judy Oldham also with Collier Shannon Scott.

MR. KLONTZ: David Klontz with the Department of Justice for the United States.

MS. SIMMONS: Jnatel Simmons for Philip Morris.

MR. SINGER: John Singer for the Federal Trade Commission.

VIDEO TECHNICIAN: I will ask the reporter to swear in the witness, please.

PROCEEDINGS

* * * * *

C. LEE PEELER,

called as a Witness, was duly sworn by Judith L. Leitz, a Notary Public in and for District of Columbia, and was examined and testified as follows:

* * * * *

EXAMINATION BY COUNSEL FOR THE DEFENDANTS PHILIP MORRIS, INCORPORATED

BY MR. WAGNER:

Q. Good morning, Mr. Peeler.

A. Good morning.

Q. What is your current title?

A. I'm the deputy director of the Bureau of Consumer Protection of the FTC.

Q. Do you have a role with the—are you the director of advertising practices?

A. I was the director of the division of advertising practices until August of last year, 2001, at which point I assumed my current responsibilities.

Q. Okay. As deputy director of the Bureau of Consumer Protection can you give me a brief description of your job responsibilities?

A. Sure, I assist the—the Bureau of Consumer Protection is one of the three main operating units of the Federal Trade Commission. It is comprised of enforcement divisions and the bureau supervises and formulates policy for those enforcement divisions. I work for the bureau director who is

Howard Beales and I assist him in his day-to-day responsibilities and supervising the work of the bureau.

Q. So you have a role with emulating and supervising policy of the FTC, correct?

A. Yes.

Q. Okay. Prior to—when you were the director of advertising practices, when did you assume that position?

A. October of 1985.

Q. And can you briefly describe your role as director of the Division of Advertising Practices?

A. Yes, the Division of Advertising Practices is a—one of the operating units of the Bureau of Consumer Protection. It specializes in national advertising issues and as the associate director for the Division of Advertising Practices it was my job to again supervise and manage the work of the division.

Q. How many people worked under you?

A. That would vary from time to time. Usually it was in the 30 to 40, 45 range.

Q. Are those the only two positions you've held with the FTC?

A. No.

Q. Okay. What did you do before you were with the director of Division of Advertising Practices?

A. Okay. I started at the FTC as a staff attorney in the Division of Credit Practices.

Q. When was that?

A. 1973.

Q. Okay. How long did you stay in that position?

BEST AVAILABLE COPY

A. For a long time. I was in the division until 1980—I was in that division until 1983. I held a variety of roles in that division. I was what we call a program manager for the Fair Credit Reporting Act Program. I was an assistant director which is a position—is a management position in the division I think for about three years. And then I left that office to join the Bureau of Consumer Protection where I was the executive assistant to the director of the Bureau of Consumer Protection from 1983 to 1985.

Q. Who was the director at the Bureau of Consumer Protection at that time?

A. Carol Crawford.

Q. And as the executive assistant to Ms. Crawford, what were your job responsibilities?

A. I assisted her in her day-to-day management and supervision of the bureau—work of the bureau.

Q. Did you help with formulating policy?

A. That wasn't as much a policy job as an implementation job.

Q. Prior to the time when you joined the Bureau of Consumer Protection as the executive assistant to Ms. Crawford did you have any dealings with cigarettes?

A. No.

Q. Okay. I sort of jumped right into all of your job responsibilities and history without doing any of the usual preliminaries. Have you been deposed before?

A. Yes.

Q. Okay. How many times?

A. Twice, I think.

Q. In what cases?

A. The—is it Rexall or Enforma? It was either the Rexall or the Enforma litigation which is ongoing and then many years before in the Freedom of Information Act case brought by the associated credit bureaus.

Q. Neither of those had to do with cigarettes, right?

A. Right

Q. Just as a general ground rule of the deposition I'll ask questions, you'll give answers.

If—I think we're supposed to try not to talk over each other so the court reporter can get everything if that is okay with you.

If there's anything I ask that you don't understand, just tell me and I'll try and clarify the question so that you can understand it and then give an answer.

And you also need to give your answers orally so that the court reporter can be taking them down, is that okay?

A. Fine.

Q. One other rule, any time you want a break, say it, we'll take a break.

A. Okay.

Q. I want to make sure that you're comfortable in the deposition.

You are an attorney, right?

A. Yes.

Q. Okay. When did you graduate from law school?

A. 1973.

Q. From?

A. Georgetown.

Q. Are you licensed to practice?

A. Yes, in the District

Q. Okay. I'm going to mark as Peeler 1 the notice of deposition for today and have you take a look at that, okay?

(Peeler Deposition Exhibit No. 1 was marked for identification.)

MR. SINGER: Just as a clarification, Jeff, and this is a minor one, we received—actually, Lee is here pursuant to Rule 45 under the Rules of Civil Procedure as a 30(b)(6) designee and is not here just under Rule 30 since the FTC has not required it since I don't think the subpoena is attached to this.

MR. WAGNER: Fair enough.

MR. SINGER: Not a big deal but just to clarify the record.

Thank you.

I want you to know we did receive a subpoena, though.

A. Okay. I've looked at this in general.

BY MR. WAGNER:

Q. Have you seen this before today?

A. Yes.

Q. And you understand that you have been designated to testify on behalf of the Federal Trade Commission, correct?

A. Yes.

Q. Okay. And there are a number of topics that are listed on Attachment A to Peeler Exhibit 1, right?

A. Yes.

Q. There are seven topics listed there?

A. Right.

Q. And are you prepared to discuss all of those topics today?

A. I am prepared to testify what I know and what I could find out about these topics. They are—

Q. They're broad?

A. Extremely broad. I don't think there's anybody that knows everything about all of this stuff.

Q. When did you first learn that you would be asked to testify in this case?

A. I got a call probably in the spring from the general counsel's office saying that they'd been told by the Defendants that several of us would be asked to testify.

Q. Okay. Did you meet with anyone or speak with anyone in order to prepare for the deposition?

A. Yes.

Q. Who?

MR. SINGER: Can I just give you an instruction, to the extent you met with counsel, don't discuss the substance. You can say who you met with, though.

A. Okay. Well, I met with counsel. I met with members of the FTC tobacco team I have talked to members of the Bureau of Economics. That's about it.

BY MR. WAGNER:

Q. You mentioned the FTC tobacco team, what's that?

A. There are attorneys in the Division of Advertising Practices who work on tobacco matters, that's not their exclusive responsibility, but they are often asked to review tobacco issues and we informally call them the tobacco team.

Q. It's just an informal name?

A. Very informal.

Q. A group of people that work with the FTC Division of Advertising Practices, right?

A. Correct.

Q. And this group has existed in one form or another for as long as you have been with the Bureau of Consumer Protection, right?

A. Well, again, let's talk about from 1983 forward because as we—

Q. That's what I'm asking, from the time you began at the Consumer Protection 1983 forward there's always been a group?

A. There has been an identifiable group of attorneys that work on tobacco issues as long as I've been there.

Q. And what's been the size of the group more or less?

A. It varies. It's usually in the three attorney range. We also have responsibilities that began I think in '84 or '85 to review rotational warning plans and there's normally a paralegal assigned to that. And we normally have a person whose responsibility it is to process the data for our annual reports.

Q. Those are the annual reports to Congress?

A. Annual reports to Congress on the cigarette advertising and later on smokeless tobacco advertising.

* * *

[Page 42, line 2 through Page 45, line 25]

Q. What was your role with that one?

A. Again, you know, for both of those cases the investigations were conducted by staff attorneys. They would have reported to a senior program manager type of person and that person would have reported to me.

Q. Okay. And then ultimately you were the one that makes a recommendation as to whether or not an enforcement action ought to be brought?

A. The staff makes a recommendation. I, you know, approve it.

Q. And what happens once you approve a recommendation

A. It goes to the—

Q. —for an enforcement action?

A. It goes from the division to the Bureau of Consumer Protection.

Q. Okay.

A. Where there is a general review of the recommendation, the bureau director decides whether or not they will support that particular recommendation. If the bureau director decides they will support it, it's forwarded to the Commission where it's reviewed by the commissioners. If the bureau director decides he won't support that particular recommendation, normally it comes back to the staff for more work.

Q. Okay. Is there a point in time during this process when the Bureau of Economics gets involved?

A. Varies considerably. By—certainly a recommendation that's forwarded to the bureau is forwarded—is, in almost all cases, forwarded to the Bureau of Economics for their review. In other instances the Bureau of Economics has already been involved in the case and it, you know, really varies based on the case.

Q. Okay. What role did you play with respect to the 1997 notice and comment regarding the FTC test method and the use of descriptors such as light and ultra light?

A. The notice was, again, prepared by staff members and reviewed by a program level person and then approved by me.

Q. And do you have a continuing involvement with that proceeding?

A. My role in the division is being fulfilled by the new division director and in her absence by an acting division director.

Q. Okay.

A. I still have involvement in that issue in my new capacity in the bureau.

Q. As of this point has the division director made a recommendation to you regarding the final disposition of that proceeding?

MR. SINGER: I would instruct you you can answer it yes or no to that, however, if it's—since it's a pending matter I would instruct it would be privileged and not public beyond that.

A. No.

BY MR. WAGNER:

Q. Okay. And, therefore, the proceeding is open, correct?

A. Yes.

Q. Okay. Did you play any role with respect to the FTC's 1998 inquiry of Philip Morris regarding its Marlboro Lights and Marlboro Ultra Lights cigarettes?

A. It was conducted by staff attorneys in my division.

Q. So you were their supervisor?

A. I was their supervisor, right.

Q. Did you play a role with respect to the FTC's response to Senator Lautenberg's November 1998 request to either ban or suspend the cigarette manufacturers right to use descriptors such as "light" and "low tar" in cigarette marketing?

A. I would have. I don't have any remembrance of the specifics.

Q. Okay. Now, based upon your experience, you are familiar with the FTC's regulatory and enforcement structure in general, correct?

A. Yes, I am.

Q. Okay. In fact, you've written and I presented an extensive piece on it, have you not?

A. I may have.

Q. Okay. We're going to mark as—I may have.

A. Do you want to show me what you're

Q. Yeah, I will.

* * *

[Page 94, line 1 through Page 101, line 19]

Q. Okay.

A. Do you want to show me—

Q. I'm not trying to—

A. Okay.

Q. —you know, test your memory or anything. I'm going to mark as Peeler—4?

MR. SINGER: Yes.

MR. WAGNER: Okay.

(Peeler Deposition Exhibit No. 4 was marked for identification.)

BY MR. WAGNER:

Q. Well, just—this is something we'll refer to from time to time. It is the transcript of the NCI Conference that took place on December 5th and 6th—

A. Okay.

Q. of 1994.

You were there, right?

A. I was there.

Q. Okay. You were the first speaker, correct, after the introduction by Dr. Freeman?

A. I—I may have been.

Q. Okay.

A. But I certainly spoke.

(Off the record.)

BY MR. WAGNER:

Q. Let me direct your attention to Page 11, the first day.

(Off the record.)

A. Uh-huh.

BY MR. WAGNER:

Q. Okay, unfortunately, these aren't numbered by lines. By the way, have you seen this transcript before?

A. I don't know that I personally saw it. I'm sure someone in my office saw it.

Q. Okay. If you'll look at the one, two, three—well, I'm in the first full paragraph that says, "Let me turn now to the history of the FTCs involvement in tar and nicotine testing."

A. Okay.

Q. If you'll look at the third sentence, didn't you say "All of our involvement, I would emphasize, has been taken under the FTCs general authority to prevent deceptive practices in advertising and labeling."

A. Yes.

Q. Okay. That's the only point I'm—I'm getting at with these questions.

A. Okay.

Q. Okay. But now—

A. The point I was trying to make is that the, you know, operation of the cigarette lab was really something that was unique and, you know, was designed to prevent a certain type of deception, but, you know, as we said when we closed the lab it was unusual for a program like that to be maintained by the Commission.

Q. Right. We're going to talk about that specifically. There are other industries that run testing and it was unusual for the Commission itself to be running the testing for the cigarette industry, right?

A. It is both unusual for the Commission to be running the testing and to be the agency that specified the testing methodology because

Q. Okay.

A. —I can't recall any other instances where the FTC itself specifies the testing methodology.

Q. Okay. Is it fair to say that the cigarette advertising has been a major concern of the Federal Trade Commission since it began examining cigarette advertising in the late 1930s?

MR. SINGER: Objection to form, particularly the use of the word "major."

You may answer to the extent you can.

A. It certainly has been a concern of the FTC. It has been an area of activity and an area where we have staff assigned.

MR. WAGNER: I'll mark another big document that we'll use from time to time.

THE WITNESS: Okay.

BY MR. WAGNER:

Q. You're aware that the FTC conducted an investigation of cigarette advertising from May 1976 through sometime like May of 1981, correct?

A. The beginning date sounds right. I'm not sure about the ending date. I mean, the ending date is when we issue the report and I assume that was writing the report.

Q. Right, there was a staff report that was published in May of 1981, right?

A. Right.

Q. And I'm going to mark as Peeler 5 the public version anyway of the FTC staff report.

(Peeler Deposition Exhibit No. 5 was marked for identification.)

A. Okay.

BY MR. WAGNER:

Q. You recognize this?

A. Yes.

Q. This is—

A. This is the public version?

Q. Well, it says on the top "Public Version."

A. Okay.

Q. It's a little hard to read.

A. Okay.

Q. But this is an agency document, right?

A. It's a staff report.

Q. Okay. This report, as a matter of fact, was approved by the Commission for transmission to Congress, was it not?

A. Yes.

Q. Okay. Now, if you look at Page 4-1, Chapter IV, the first page, which is about halfway through the document.

MR. SINGER: Jeff, what is the date on this again, I'm sorry?

MR. WAGNER: May 1981.

MR. SINGER: Thank you. I just couldn't read it.

A. Okay, so where are we?

BY MR. WAGNER:

Q. 4-1.

A. 4-1, okay.

Q. Okay. What's the first sentence of the text of that page?

A. "Cigarette advertising has long been a major concern of the FTC."

Q. Since?

A. Right under a heading that says "Cigarette Advertising Has Long Been a Concern of the Federal Trade Commission."

Q. Right. And, so, the FTC staff after an investigation summarized some history and came to the conclusion that cigarette advertising has in fact been a major concern of the Commission since it began examining cigarette advertising in the late 1930s, right?

MR. SINGER Objection to form.

A. I mean, I'm not sure where you're going with it, but . . .

BY MR. WAGNER:

Q. Nowhere. I'm just—it says what it says, right?

A. That's what—that's what the report says, the report doesn't investigate the FTC, it's just looking at—

Q. Correct.

A. —you know, it was looking at the health warning issues involved in tobacco.

Q. Okay.

A. And, again, it is a staff report.

Q. Correct, a staff report that is approved by the Commission for transmission to Congress, though, right?

A. Well, the Commission sent it to Congress. They also, I think, put it on the public record for comment and they actually issued a—their own statement in 1984—

Q. Okay.

A. —saying what their conclusions were and I don't have a copy of that statement with me right now, but . . .

Q. Okay. Historically—I'm just trying to get a sense of the historical perspective now which is, you know, why—why I brought that to your attention.

A. Okay.

Q. The Commission's first actions with respect to—and I know you reviewed the history at least in part prior to your presentation at the NCI Conference in 1994, right?

A. With respect to tar and nicotine, yes

Q. Yeah, okay.

A. But not with—this is—was a much broader review.

* * *

[Page 158, line 7 through Page 213, line 25]

BY MR. WAGNER:

Q. And the FTC also had its other tools available such as cease and desist orders, correct?

A. Right, but, again, to—to take any action, the FTC has to show that, you know, in light of the evidence that exists at that time the practice is unfair or deceptive.

Q. Okay. Let's move forward in time.

A. Okay.

Q. After—

A. Good.

Q. Yeah. Well, we'll try and find a way. I think we're getting at least into areas that you did review the history and you did talk about at the NCI Conference so maybe it will be a little bit easier for you, although, it doesn't get much more modern.

In January of 1964, the Surgeon General issued its report on smoking and health, right?

A. Yes.

Q. And the FTC's view was that the 1964 Surgeon General report provided an evidentiary foundation to support a rule requiring a positive statement of average tar and nicotine yields in cigarette labeling and advertising, right?

MR. SINGER: Objection to form.

You may answer.

A. Well, I don't know if I would agree with your characterization, but they certainly issued the report. My written statement to NCI says that two years later the public health

service stated that the preponderance of scientific evidence clearly suggests that the lower the tar and nicotine content of cigarette smoke the less harmful the effect would be. And in that whole mixture of information the Commission took two steps in 1966 to encourage manufacturers to provide comparative information.

BY MR. WAGNER:

Q. Actually, even before the 1966 public health statement, though, the FTC initiated a trade regulation rule making proceeding, didn't it?

A. I don't know the date that the trade regulation rule was initiated. I know that there was a proposed trade regulation rule.

Q. This one I've got. I can help you out. Peeler 13—

(Peeler Deposition Exhibit No. 13 was marked for identification.)

A. Good.

BY MR. WAGNER:

Q. —is a copy of the Proposed Rule Making from January of 1964. It's published at 29 Federal Register Pages 530 through 532.

A. Okay, this was issued in January 17th, 1964.

Q. Right. That's within a week of the Surgeon General's report, right? Surgeon General report, I think, was January 11th.

A. Yeah, I don't know that, but it—

Q. Okay.

A. —it came out when it came out.

Q. Okay. Now, here in Peeler 13 the FTC was proposing a formal rule that would require health warnings on all cigarette packs and on all cigarette advertisements, right?

A. Oh, this is the 1964—

Q. Yes.

A. That was one of the proposals to the rule, yes.

Q. Okay. And the rule, I think it's Rule No. 3, that is proposed there, also would permit tar and nicotine yield statements provided that such statements were verified in accordance with a uniform and reliable testing measure approved by the FTC, right?

A. The proposed rule says that "No cigarette advertisement shall contain any statement as to the quantity of any cigarette smoke ingredient, e.g., tars and nicotine which has not been verified in accordance with a uniform and reliable testing procedure approved by the FTC."

Q. Okay. Now, if this role were enacted then that would reverse the policy of a ban on tar and nicotine yield advertising, right?

A. That's not clear to me just from reading that section. Let me look at what the comment says.

(Off the record.)

A. Well, this would allow targeting claims as cigarette advertising as long as it's done in accordance with a procedure that's been verified as reliable by the Commission and it's accompanied—it seems like it has to be accompanied—the example seems to indicate it has to be accompanied by a number of other disclosures.

BY MR. WAGNER:

Q. Right. But as long as it met those requirements now tar and nicotine yield disclosures would be permitted, right?

A. Yes.

Q. Whereas, prior to this time such disclosures were banned, right?

MR. KLONTZ: Objection.

A. Well, again—again, absent that press release in 1960 the Commission announced that there was an agreement among manufacturers not to advertise—

BY MR. WAGNER:

Q. Right.

A. —tar and nicotine content, so I assume that's a ban.

Q. Well, you characterize it as a ban—

A. Right.

Q. —at the NCI Conference.

A. Right, so—

Q. Okay.

A. —I assume that it's a ban.

Q. Okay. Now, the FTC recognized in the comments to these rules that disclosing, displaying or advertising tar and nicotine yield numbers would constitute a health claim, right? If you look at the comments—comments to Rule 3, the second sentence, it says, "A quantitative disclosure of cigarette smoke ingredients is a claim concerning the health consequences of smoking the advertised brand."

Do you see that?

A. I'm sorry, it's the second paragraph?

Q. Second sentence of the comments to Rule 3.

A. Okay. That's what it says.

Q. Okay. And this is an official statement of the FTC published in the Federal Register, right?

A. Yes, this is a proposed rule.

Q. Okay. And the FTC's position also was that consumer confusion could be obviated and the ability of con-

sumers to make an intelligent choice among competing brands protected if the measurements of tar and nicotine were made with a uniform testing procedure, right?

A. That's what it says.

Q. Okay. And the FTC believed at the time that it would be good to encourage a marketplace competition for the research development and marketing of low yield products, right?

A. I would have to look and see what they say in the statement of basis and purpose.

Q. Well, look at the comments. I think it's to Rule 2. See the second paragraph, in the second sentence of the second paragraph, it says, "Indeed, it is the Federal Trade Commission's policy to encourage the developments of less hazardous cigarettes."

Do you see that language?

A. Right.

Q. Okay. And by "less hazardous," the FTC was talking about a reduction in tar yields, right?

MR. KLONTZ: Objection.

A. You know, you have to bear with me because this is a—

BY MR. WAGNER:

Q. That's okay.

A. —very bad copy and I'm having—because—because, you know, this is a comment on part of the rule that seems to relate to—it says, "No cigarette advertisement shall state or imply, by words, pictures, symbols, sounds, devices or demonstrations, or any other combination thereof, that smoking the advertised cigarettes: Promotes good health or physical well-being; it is not hazardous—it's not a hazard to health; or is less of a hazard to health than smoking other

brands, except that a specific factual claim respecting the health consequences of" something "may be advertised if: The advertiser, before making the claim, has substantial reliable evidence to prove the accuracy and the significance of the claim; and all facts materials to the health consequences of smoking,"—

MR. KLONTZ: Could I make a general request. For the sake of the record being a little more complete, if either of you are going to read from one of these documents, read at a normal pace rather than faster because just because it's on the printed page doesn't mean the reporter is going able to take it down if you read it at 60 miles an hour which I think just happened now. I suspect that not all of that was put into the record.

THE WITNESS: Okay.

MR. WAGNER: All right.

MR. SINGER: Why don't we start over.

A. So my confusion is this section that has that comment in it is—seems to be talking about something different than Rule 3 which is talking about tar and nicotine content. But as I described in my written statement, you know, at some point, and I'm not sure if it's here or in the process of this rule making, the Commission did decide that it should encourage tar and nicotine claims with the specific reservation that there shouldn't be anything other than the tar and nicotine numbers, no accompanying health claim.

BY MR. WAGNER:

Q. And one of the goals underlying that FTC decision was to encourage the development of a marketplace competition for the research, development and marketing of lower yield cigarettes, right?

MR. KLONTZ: Objection.

BY MR. WAGNER:

Q. Just one of the goals?

A. The purpose was to encourage competition in among companies in lowering machine measured tar and nicotine yields in cigarettes.

Q. Perfect.

Now, at the time of this proposed trade regulation rule making in 1964, no such uniform and reliable testing procedure existed, right?

A. Not that I know about, although, you know, the—this is a little bit different approach than the ultimate approach that was taken. This says—

Q. Right.

A. —as long as—you can use the procedure as long as it's approved by the Federal Trade Commission.

Q. Right.

A. And the ultimate approach was for the FTC to specify the procedure.

Q. Right. After the—after the publication of the proposed rule a couple of significant things happened. First, Congress passed the FCLAA, right?

MR. KLONTZ: Objection.

A. That is correct. After the passage of the rule—

BY MR. WAGNER:

Q. Okay.

A. —legislation is enacted stating the rule.

Q. And the legislation—

A. But—

Q. Oh, sorry.

A. I need to make one—the final rule, at least what I read about the final rule in preparation for this, didn't seem to contain these provisions and there wasn't any discussion in the statement of basis and purpose that I saw about why those provisions weren't included in the rule.

Q. That's exactly where I was heading.

Well, the FTC's understanding of the FCLAA was that Congress had mandated specific warnings, right?

A. Again, we're talking about a period of time that predates me, but my understanding is—my understanding has always been that the FTC adopted the—as a result—as a part of this rule making the Commission adopted a 1964 rule which requires health warnings on cigarettes, I think labeling and advertising, but maybe just advertising. That the Commission delayed implementation and Congress enacted legislation stating the rule. What I was referring to is that—and, again, you know, I'm—this is just what my understanding of it is—

Q. Okay.

A. —is that somehow from this proposed rule to the adoption of the final rule, the—two provisions that we were just discussing were dropped out and I was not able to find any independent reason why they were dropped out

Q. Okay. We'll see if we can figure that out together.

In 1964, you're aware that the cigarette manufacturers also adopted the cigarette advertising code. right?

A. I know that they have adopted a cigarette advertising code.

Q. Okay. And the cigarette advertising code had a number of restrictions on cigarette advertising and marketing, right, it was an attempt at industry self-regulation?

MR. KLONTZ: Objection.

A. Again, in the materials I reviewed I read a copy of the code that you had provided and—or somebody had provided and it contains restrictions on different types of advertising.

BY MR. WAGNER:

Q. Okay. For example, the cigarette advertising code had a requirement that advertising be precleared with the code administrator, right?

A. I don't have independent knowledge of that, but it's in the code I assume.

MR. WAGNER: I'll tell you what, maybe we can—it's 12:30. Would you like to break for lunch. We can put a few more documents together.

THE WITNESS: I'm happy to do that.

That's fine.

MR. WAGNER: You want to do that?

THE WITNESS: Yeah.

MR. WAGNER: We'll put some documents together so that we can plow forward.

THE WITNESS: Great

MR. WAGNER: Okay.

VIDEO TECHNICIAN: The time is 12:29:39. We're going off the record.

(Lunch recess.)

VIDEO TECHNICIAN: The time is 1:24:37. We're back on the record.

(Peeler Deposition Exhibit Nos. 14 and 15 were marked for identification.)

BY MR. WAGNER:

Q. Welcome back, Mr. Peeler.

I put before you Peeler 14 which is a copy of the final Trade Regulation Rule issued June 22nd, 1964, as published in the Federal Register. And I'm also going to show you Peeler Exhibit 15, which is a copy of the cigarette advertising guides that we were discussing earlier.

MR. SINGER: Thank you.

BY MR. WAGNER:

Q. Because the two go hand in hand for these questions.

MR. SINGER: Is this cigarette advertising guide or cigarette advertising code?

MR. WAGNER: Cigarette advertising code.

MR. SINGER: Okay. Thank you.

BY MR. WAGNER:

Q. For the record, Peeler 15 is a document entitled "Robert B. Meyner," M-E-Y-N-E-R "Administrator Cigarette Advertising Code, Inc.," and it attaches a copy of the cigarette advertising code with Bates stamp numbers are 2071166550 through 5588.

A. Okay.

Q. Peeler 15 is the cigarette advertising code that we were discussing before lunch break, right?

A. Yes.

Q. And that's something that you've seen before?

A. I have actually prior to preparing for this not seen it except as it was reprinted in the New York Times so I don't know that I'd seen the same thing but I had seen it in preparation for this—

Q. Okay.

A. —deposition.

Q. And in reviewing Peeler 15 you see Article II of the cigarette advertising code provides for a code administrator, right?

A. Yes.

Q. Okay. And Article III has various sections referring to advertising clearance, has a section—

A. Yes.

Q. —on advertising clearance.

Okay. And that refers to pre-clearance of ads before they are run; is that correct?

A. Yep.

Q. Okay. And Article IV has various advertising standards that are detailed over the course of three and a half pages?

A. Seems to.

Q. And, then, Article V enumerates certain procedures in the event of a violation of the code, right?

A. That's what it says.

Q. Okay. Now, we were talking about the 1964 trade regulation rule that had three proposed rules in it, right?

A. Right.

Q. One dealt with warning labels and then there were two additional rules.

Now, by the time of the final rule on June 22nd, 1964, the FTC determined to withdraw the second and third rules, correct?

A. Not to adopt the proposed rules.

Q. Not to adopt those rules. And the basis for the FTCs decision was that it wanted to give the cigarette industry an opportunity to implement the provisions of the cigarette ad-

vertising code and, perhaps, make those rules unnecessary, correct?

A. There's not a direct reference here to the cigarette advertising code but there is a statement that the industry has indicated an intention of acting voluntarily to end undesirable practices in the areas covered by the proposed rules.

Q. And the Commission, therefore, determined not to adopt proposed Rules 2 and 3 or any similar provision at this time as formal trade regulation rules, correct?

A. That's correct.

Q. Okay. Now, vacating those two rules, though, was not the end of FTC activity with respect to tar and nicotine yield disclosures in advertising, was it?

MR. KLONTZ: Objection.

BY MR. WAGNER:

Q. The story doesn't end there, does it?

MR. KLONTZ: Objection.

MR. SINGER: Objection, form.

You may answer.

A. I'm—I'm not sure exactly what you're asking but the Commission's been active in targeting advertising since then.

BY MR. WAGNER:

Q. Okay. In fact, even though Congress passed the Federal Cigarette Labeling and Advertising Act in 1965, in the FTC's view that did not change the FTC's authority to monitor and police unfair and deceptive acts and practices in advertising and marketing, right?

MR. KLONTZ: Objection.

A. I'd have to look at the statute. I know there's a complicated series of amendments that were designed to make

sure that except for the warnings specified by Congress that the FTC's authority remained intact I don't know the precise timing of those amendments, but ultimate—ultimately that is where the act ends up.

BY MR. WAGNER:

Q. Okay. And in order to move the ball forward with respect to tar and nicotine yield disclosures, by March of 1966, the FTC took the view that it was going to reverse its policy that had banned any disclosure of tar and nicotine yields, correct?

MR. KLONTZ: Objection.

A. Again, I'm going to, look at my statement

You know, in 1966, we took two steps to encourage comparative information about tar and nicotine yields.

BY MR. WAGNER:

Q. Right. Okay—

A. And one of those is ending the ban on tar and nicotine advertising.

Q. Right.

(Peeler Deposition Exhibit No. 16 was marked for identification.)

BY MR. WAGNER:

Q. I'm going to show you Peeler 16 which is a letter dated March 24th, 1966, sent from Joseph W. Shea, Secretary of the Federal Trade Commission, to Philip Morris, Inc., it has Bate stamp number 1005112588. I'll represent to you that identical letters were sent to all of the cigarette manufacturers and ask you if you've seen this document before?

A. I've seen—I've not seen this document before. I've seen the text of this document before.

Q. Okay.

A. And the person that signed the document is the secretary of the Commission who acts at the direction of the Commission.

MR. WAGNER: Is there something you needed to say?

MR. SINGER: I'm just showing the witness where this has been reproduced elsewhere.

MR. WAGNER: Correct.

MR. SINGER: The cigarette advertising guides were March 25th rather than March 24th, but I—the same text.

MR. WAGNER: Okay.

BY MR. WAGNER:

Q. Now, in the letter which was sent by the direction of the Commission, Mr. Shea says that advertising tar and nicotine yields will not be—would not be in violation of the guides or of any provisions of law administered by the Commission.

Do you see that language?

A. Uh-huh. Yes, I do.

Q. What did the Commission mean by a violation of the guides?

MR. SINGER: Again, I'm going to object to the extent it calls for speculation, but to the extent you know please feel free to testify.

A. I don't—I don't know what violation of the guides means because, you know, technically you can't violate a guide. It's not—it's not actionable to violate a guide. What's important is whether it's an unfair or deceptive act or practice under Section 5.

BY MR. WAGNER:

Q. Right.

A. The guides are designed to give guidance as to what would or not be an unfair or deceptive act or practice so I—my assumption is what they're saying here is an interpretation of the guides it would prohibit these claims.

Q. I see.

A. Would be inappropriate going forward.

Q. Let me ask you this: If the FTC believes that there has been a violation of the guides, can the FTC use that as evidence in an enforcement proceeding?

MR. KLONTZ: Objection.

A. I don't believe we can.

BY MR. WAGNER:

Q. Is there some prohibition on that?

MR. KLONTZ: Objection.

A. I'm not aware of any doctrine of law that would allow us to use it—there's nothing—there's no legal doctrine saying it's a prima facia case or a presumptive violation or anything like that I suspect that we could argue that it shows agency interpretation of its statute, but, you know, we would still have to prove the underlying—to win a case we'd still have to prove the underlying Section 5 application.

BY MR. WAGNER:

Q. Okay. This is referring, when it says to the guides, to the 1955 cigarette advertising guides, right?

A. I don't know what else it would be referring to.

Q. Well, that—that's referenced in the very first sentence of the letter, right?

A. Okay, you're right.

Q. Okay. And so—and in this letter the FTC is also disclosing its choice for a standardized test method, correct?

A. Yes, it is.

Q. Okay. And by this letter the FTC was informing Philip Morris and the other cigarette manufacturers of its policy from this point going forward, correct?

A. Yes.

Q. Okay. And the FTC also issued a press release announcing the policy, right?

A. Yes.

Q. Okay. And the policy of the FTC from this point going forward was to permit tar and nicotine yields to be disclosed in advertising in accordance with the chosen test method, right?

A. That's the effect of it. I mean, the legal basis for it is a determination that a claim limited to tar and nicotine content that's determined by this method would be considered to be a substantiated claim.

Q. Okay. And the FTC did not need a trade regulation rule in order to announce this policy, correct?

MR. KLONTZ: Objection.

A. Well, that's an interesting question.

BY MR. WAGNER:

Q. Okay. Did the FTC use a trade regulation rule to announce this new policy?

A. No, they didn't.

Q. Okay. But the policy was adopted after investigation, deliberation and consideration by the Commission, correct?

A. That's my understanding from conversations I had with Harold Pillsbury, yes.

Q. Okay. And this policy, the one articulated in Peeler 16 to permit factual statements of the tar and nicotine content expressed in milligrams of the mainstream smoke from a cigarette as long as they are substantiated by tests conducted in accordance with the Cambridge filter method adopted by the FTC, has been the FTC's policy in effect continuously since March 24th, 1966, correct?

A. Well, let me go back. I mean, there's another qualification there which says "no collateral representations (other than factual statements of tar and nicotine content of cigarettes)."—

Q. Okay.

A. —"are made, expressly or by implication, as to the reduction elimination of health hazards?"

Q. With that amendment?

A. With those two amendments, that continues—the Commission has not revoked that policy. The Commission has expressed on a number of occasions concerns about the adequacy of the test method and the communication of that to consumers.

Q. Okay, but the fact remains that the policy announced in this letter dated March 24th, 1966, has not been revoked, correct?

A. We have not revoked the Cambridge filter test method and we have not challenged tar and nicotine claims made under that—purely tar and nicotine claims made under that test method.

Q. Okay. And at the time the FTC determined to permit advertising containing representations regarding cigarette's average tar and nicotine yields. One goal of the FTC was to permit comparisons between brands, right?

MR. SINGER: Objection, comparisons between brands by consumers, by—

MR. WAGNER: Yes.

MR. SINGER: —advertising..

MR. WAGNER: By consumers. By consumers.

MR. KLONTZ: Objection.

A. The goal of specifying uniform test method was so that accurate comparisons between brands could be made.

BY MR. WAGNER:

Q. By consumers choosing among cigarettes, correct?

A. Well, I've never heard it phrased exactly that way so that accurate comparison could be made by—in advertising.

Q. Take a look at the Peeler 4, if you would for a second.

A. Okay. What page?

Q. It's the second day so I think you'll see a red—

MR. SINGER: Yes. There's a divider.

BY MR. WAGNER:

Q. Divider in there?

A. Okay.

Q. All right, take a look at Page 18 of the second day. This is December 6th, 1994.

MR. SINGER: What page, I'm sorry?

MR. WAGNER: 18.

MR. SINGER: Thank you.

A. Page 18?

BY MR. WAGNER:

Q. 18. About two-thirds of the way down the page Dr. De Bethizy, D-E, second word B-E-T-H-I-Z-Y, asks the

chairman, Dr. Freeman, whether you could clarify what the purpose of the FTC test method is and you responded.

Do you see that?

A. I do.

Q. And what was the first sentence of your response?

A. "So I would go back to the statement that I started with yesterday, and that is to say that the purpose of the FTC rankings when they were put together was to establish a comparative basis for consumers choosing among cigarettes."

Q. Okay. And, then, if you flip ahead to Page 22, we cover the topic again. The second paragraph, I believe, is you again, right?

A. Me again.

Q. And what is it you said on Page 22 in the first sentence?

A. "The FTC method as it was conceived and implemented was designed to provide consumers with comparative information about the relative tar and nicotine content of cigarettes."

Q. Now, those were your words, right?

A. Yes.

Q. And you intended to accurately and fairly state the history at that conference, right?

MR. KLONTZ: Objection.

A. I don't know what that question means.

BY MR. WAGNER:

Q. Well, I just mean that—

A. I didn't mean to mislead the conference.

Q. Well, sure, that's all I'm saying.

A. Okay.

Q. Part of your function at the conference was to give the conference participants a sense of the history of the FTC test method, correct?

A. Correct.

Q. And you had done some research before you spoke at the conference to make sure you had an understanding to the point where you felt comfortable discussing that topic, right?

A. Right.

Q. And, so, the statements that you made at this conference about the purpose of the FTC test method as it was conceived and implemented was your best view based upon the research you had done in your personal experience regarding the history of the test method, correct?

A. Right, and the only point of clarification I want to add is I think your original question was had the FTC said that. And, you know, just like anybody else I'm just one person, that's what my interpretation was. I think what you're asking me was had the FTC said that and I said I wasn't aware that the FTC—I wasn't aware of an FTC statement verbalizing it that way and there's a difference.

Q. Okay. Are you aware of anyone—of the FTC ever taking an official position contrary to the statements you articulated at the NCI Conference regarding the purposes of the FTC test method?

A. No.

Q. Okay. Now, in addition to ending—we can strike that And a second goal of the FTC in adopting the FTC test method was to encourage the development of a marketplace competition for lower tar and nicotine cigarettes as measured by the FTC test method, right?

A. That's my understanding.

Q. Okay. Now, when the FTC announced its new policy in March of 1966, the policy did not permit advertisements of tar and nicotine yields as is set forth in Peeler 16. The FTC also requested comment from interested individuals, right?

A. On the—on what?

Q. On—on the test method. On the proposed test method.

MR. SINGER: Are you talking, I'm sorry, about Exhibit 14 or 15?

MR. WAGNER: 16.

MR. SINGER: 16, okay, I'm sorry.

MR. WAGNER: Right.

BY MR. WAGNER:

Q. 16 is the announcement of the new policy and the identification of the Cambridge filter method as the FTC's choice for the standardized test method that it's going to follow.

A. Okay. Yeah, I don't know.

Q. Okay.

A. You know, someplace—sometime during this process there's a decision to not only use this test method, but to have the FTC use it. I don't know that—I'm not aware that we sought comment on this particular letter, it seems pretty final to me, but . . .

Q. Are you aware that the FTC held a public hearing on the test method in—on November 30th, 1966?

A. You know,—I'm not aware that they did that. I assumed that there are documents saying that they did and that that—if they did, there would be a document announcing it and that that document would say what they were doing.

Q. Okay. So you haven't had a chance to review any of the submissions by any interested parties regarding the FTC test method or the transcript of the hearing prior to this deposition, have you, or you have not done so?

A. The 19—

Q. The 1966—

A. No, I have not.

Q. The period leading up to the formal adoption of the test method.

A. No, I have not had an opportunity to do that.

Q. Okay. Are you aware generally that the FTC received technical memoranda regarding the smoking machine measurements from the tobacco companies?

A. No, I'm not.

Q. Okay. By July 31st, 1967, the FTC had made up its mind regarding a test method and the FTC directed its staff to conduct formal testing of cigarettes under specified conditions and reported that decision in the Federal Register, are you aware of that?

MR. KLONTZ: Objection.

MR. SINGER: Objection to form.

You may answer.

A. Yeah, the stuff that I'm aware of is the stuff that was in my written statement because that was pulled together for me and documented—

BY MR. WAGNER:

Q. Right.

A. —in advance of the NCI Conference. And, you know, by mid-1967 the laboratory was ready to begin testing

cigarettes for tar and nicotine yields and there's a Federal Register Notice on August 1st, 1967, announcing that.

Q. Okay, why don't we mark that and make sure we're all talking about the same thing, then. We'll mark as Peeler 17.

Thanks.

MR. SINGER: Thank you.

(Peeler Deposition Exhibit No. 17 was marked for identification.)

BY MR. WAGNER:

Q. The FTC notice or the Federal Register Notice dated Tuesday, August 1st, 1967.

A. Just cleaning up here for a minute.

Q. Sure.

A. Okay. Yeah, this is the notice referred to in my statement.

Q. Okay. And this notice contains directions to the staff of the Federal Trade Commission to commence testing cigarettes under the Cambridge filter method as modified by the Commission, right?

A. Yes.

Q. Okay. And the testing protocol that the FTC adopts ensures that cigarettes are tested exactly the same way, right?

MR. KLONTZ: Objection.

A. The purpose of the testing protocol is to be sure that if two different laboratories test the same brand of cigarettes that they would get essentially the same results.

BY MR. WAGNER:

Q. And the way that that would be accomplished is by standardizing the test protocol, right?

A. It's by both standardizing the test protocol and specifying a, you know, large enough sample of cigarettes so that the variations in the cigarettes are accounted for by the testing methodology.

Q. Okay. And under the testing protocol there will be an identical number of puffs per minute taken, correct, one puff per minute?

A. Yes.

Q. Okay. And under the testing protocol each puff will last two seconds, tight?

A. Yes.

Q. And every—the volume of each puff is going to be 35 millimeters per puff, right, that's what Dr. Pillsbury explained?

A. Yes.

Q. Okay. And there's going to be a standardized butt length for the cigarettes of 23 millimeters or the length of the filter plus a 3 milliliter overwrap, right?

A. Yes.

Q. Okay. And prior to testing, I don't know if this is in —spelled out in that notice, but Dr. Pillsbury talked about it in 1994, that all cigarettes are prepared or conditioned prior to testing.

Do you recall that?

A. Yes, cigarettes are prepared and conditioned. In fact, there's a publication that I think we handed out that was by Ogg on what the testing methodology—

Q. The Cambridge filter method is—

A. It's the longer description of the Cambridge filter method.

Q. Dr. Ogg is credited with creating the Cambridge filter method, right?

A. Yes.

Q. It's known sometimes as the Ogg method, right?

A. That's my understanding,

MR. WAGNER: That's O-G-G.

BY MR. WAGNER:

Q. And prior to testing, the cigarettes are prepared or conditioned by keeping them in storage at a specified temperature and humidity level for a minimum of 24 hours, right?

A. I'm not familiar with the details. I know that there is a storage and preparation process and presumably Harold Pillsbury's testimony talks about that.

(Peeler Deposition Exhibit No. 18 was marked for identification.)

BY MR. WAGNER:

Q. I'll show you Peeler 18 which are Dr. Pillsbury's written comments.

A. Yes, Harold Pillsbury says "Before being smoked, the cigarettes are 'conditioned,' by being placed on storage trays in a room maintained at 75 degrees Fahrenheit and 60 percent relative humidity for not less than 24 hours."

Q. And this is done to make sure that there are no variations in moisture contents, right?

A. It's—it's done—I'm not sure if it's just moisture content. It's made—it's done to make sure that, again, the results—if this test is done in different laboratories it would be comparable standardizing results.

Q. If the humidity were different, the test results could be different, correct?

A. Presumably.

Q. Okay. And so we don't have a different test for Washington, D.C. in the summer and California in the winter, we want to make sure that everything is the same nationally, right?

A. There's just one testing methodology.

Q. Okay. And the FTC does not perform different tests or report different test results for different states or different regions and has never done so, right?

A. I'm—I am not aware of the FTC ever doing any testing beyond the testing that's described in this protocol.

Q. Okay. The FTC, the parameters that we've discussed in the testing protocol, has retained all of these same parameters for testing tar and nicotine yields—tar and nicotine yields, not carbon monoxide, tar and nicotine yields since August 1st, 1967, correct?

A. My understanding is that there have been some slight changes and I'm not even that sure what they are, but the general test method and these parameters have been maintained.

Q. Okay. And the FTC itself did the testing for approximately 20 years, right?

A. Yes.

Q. Okay. And then the FTC closed its lab and responsibility for conducting the tests shifted to TITL, the Tobacco Institute Testing Lab, right?

A. Well, during the time the FTC had been doing the test the Tobacco Institute Testing Lab had also been doing the test and there had been collaboration between the two labs to ensure that the test results were the same. And the record over that period was that the test results were remarkably uniform and so we didn't see a need to retain our testing lab.

Q. There was no basis to believe that the test run by the Tobacco Institute Testing Lab were inaccurate, right?

A. The—

MR. SINGER: Objection to form. You may answer.

A. —experience was that the results of the FTC testing lab and the TITL testing lab were quite comparable.

BY MR. WAGNER:

Q. Okay. Now, I think you testified earlier that having the FTC run the testing lab is unusual.

A. Among government programs it seems very unusual to have an agency actually doing the testing for the industry.

Q. Okay. When it comes to, for example, energy efficiency rating, appliance manufacturers run their own tests, right?

A. Right. The normal course is the government would say this is the type of testing methodology we would like to see followed and the industry would do the test.

Q. And when the FTC has such a procedure in place it expects compliance with the testing method that it—that it has discussed with the affected industry, right?

A. Could you—

Q. Yeah.

Well, you said the usual course of business is for the industry to run its own tests, right?

A. Yes.

Q. Okay. And—well, let's just move on then.

Now, the FTC closed its lab so that the cigarette testing would then be done by TITL and they would submit their data to the FTC, right?

A. Yes.

MR. KLONTZ: Objection.

BY MR. WAGNER:

Q. Okay. And the FTC took certain steps in order—

A. But can I go back?

Q. Sure.

A. TITL simply continued the testing that they had been doing before, it's not like they started testing only after we closed our lab.

Q. Understood.

And the FTC insisted on certain oversight provisions, correct?

MR. SINGER: Objection as to form. You may answer.

A. Well, it's a voluntary program and one of the—one of the things that happened when we closed—back a couple of steps. It's a voluntary program that's defined by an agreement among the tobacco companies. One of the things that happened—and that agreement was premised on the existence of an FTC test—testing facility so that when we abolished the FTC lab there had to be some changes made in the agreement, the voluntary agreement, to accommodate the fact that it was going to be TITL that was doing the testing and not the FTC. And as part of that review of that agreement, the industry agreed that Harold Pillsbury would have access on—at any time on an unannounced basis to inspect the testing procedures and that, I think, is incorporated in the voluntary agreement. It may also be evidenced by a separate letter.

Q. Okay.

A. So I'm not—I'm not positive about the second part.

Q. Okay. The ability of Dr. Pillsbury to have unrestricted access to the lab and to the data and to make unannounced visits and inspections was something that was important to the FTC, correct?

A. It was important to us. I think it was also important to the industry.

Q. Sure. And the FTC obtains all the data from TITL by compulsory process, right?

A. Yes. We—in fact, we had always had, but we would send 6B requests which are orders to file special reports to the Tobacco Institute Testing Lab and they would—no, I'm sorry, not to the tobacco and—to the cigarette manufacturers and they would provide us with the results of the Tobacco Institute Testing Lab testing.

Q. And the FTC also requires sworn verifications as to the accuracy of the data, right?

A. Yes, the responses to 6Bs are sworn.

Q. Okay. So just so we get where we are now in history. And we—the FTC has determined in March of 1966 to permit disclosure of cigarette's average tar and nicotine yields in advertising and marketing as long as they're based on an approved uniform method, right? That's one piece of the tar and nicotine program, right?

A. Again, though, the FTC's authority here is to prohibit unfair or deceptive or unsubstantiated claims and what the FTC did in '66 is to clarify that from that point on they would consider a testing that was done—claims that were based simply on tar and nicotine content, nothing else, based on testing done by uniform—by this uniform method would be substantiated claims that they would allow in advertising.

Q. Okay. And, then, in July of—or August 1st, 1967, the FTC determined to adopt a modified version of the Cambridge filter method by which all cigarettes would be tested? It's the second piece, correct? That's—

A. Okay. '66, right.

Q. '66 is when FTC announced the policy—

A. Well, in '66 we also announced that you should do it pursuant to Cambridge—

Q. I see.

A. —filter method.

Q. And on July 1st, 1967, the FTC actually directs the beginning of the testing to be done by the FTC?

A. By an FTC lab, right.

Q. By an FTC lab, right.

Now, the next part of the FTCs tar and nicotine program is that the FTC determines to publish the results of its testing. right?

A. We did publish the results of our testing. When do we make that decision?

Q. I think as you described in your speech there was a request by Senator Magnuson of the FTC to furnish Congress with its test results, right? If you look at, I think, Pages 12 to 13—or actually it's Page 13 of the December 5th transcript, there's a reference to that, and it's also in your written statement if you're looking at that. I think it's at Pages 4 to 5. You see at the very bottom of Page 4. I think you're looking at Peeler 8, is that right?

A. Yeah, I'm looking—and I—and I see it, I just—I don't have a temporal—I don't have dates—

Q. I see.

—on that so I don't know exactly when it occurred. I assume it occurred fairly recently after that. I think—but I don't know—I also don't know the date of our first tar and nicotine report, but that would be a matter of public record.

Q. Right. Well, the first tar and nicotine test reports were issued in November of 1967, right, does that sound about right to you?

A. You know, I would have to look at them, but—

Q. Okay.

—I wouldn't be surprised.

Q. Okay. And the FTC published those test results in the Federal Register, correct?

A. Again, I don't have independent knowledge of that but there should be a document showing that.

Q. Well, is it your understanding that that was the ordinary course of business for the FTC, that the test results were in fact published in the Federal Register?

A. No, I didn't know that.

Q. Okay.

A. Because by the time I got to the FTC I don't think we published them in the Federal Register.

Q. The FTC was publishing tar and nicotine reports—

A. Yes.

Q. —as a freestanding document?

A. Yes.

Q. Okay. And—and that's a process that has continued to today, right?

A. Yes.

Q. Okay. Now, you—you began to speak a little bit about voluntary agreement which I think is the next step in creating and defining the FTCs tar and nicotine program so let's go there.

We've got a—the policy as articulated in the March 24th, 1966, letter to permit publication of tar and nicotine yields pursuant to the method, right?

A. Right.

Q. And, then, we've got the adoption of the test method on August 1st, 1967, right?

A. Right.

Q. Okay. And we've got the FTC—publishing FTC test method results either in the Federal Register or in its tar and nicotine reports, correct?

A. Correct.

Q. The next step is that the FTC also made a determination that it wanted the cigarette manufacturers to publish FTC test method and results in their advertisements, correct?

MR. KLONTZ: Objection.

A. I don't have the temporal framework for this, but

BY MR. WAGNER:

Q. All right.

A. —my understanding is that at some point the FTC either proposed or discussed a trade regulation rule to require disclosure of tar and nicotine test results. That the industry responded to that by saying that they would come up with a voluntary agreement to do that themselves and the FTC withdrew the trade regulation rule and said—and I think there was also an announcement that the industry had entered into this agreement among themselves to publish the results.

Q. Okay. Well, let's take it a little bit step by step.

A. But I—and I—the documents are here somewhere.

Q. [illegible]hey are. We have no shortage of documents. You've already figured that out, right?

A. Yes.

Q. I'm pretty good with the documents. The FTC initiated the trade regulation rule making proceedings in order to require that the cigarette manufacturers would publish FTC test method tar and nicotine results in their advertising, right?

A. Proposed a trade regulation rule that would have required disclosure of tar and nicotine information in cigarette advertising and I think on labels, right? Or not?

Q. Let me see if I can get the proposed trade regulation rule.

Here it is. I think it's this one.

(Peeler Deposition Exhibit No. 19 was marked for identification.)

BY MR. WAGNER:

Q. I'll show you Peeler 19 which is the Proposed Rule Making by the Federal Trade Commission from August 8th, 1970, regarding advertising of cigarettes. It's published in the Federal Register on August 8th, 1970. It's Volume 35, Page 12671.

Is this the Federal Register Notice you were referring to?

A. Yes, it appears to be.

Q. Okay. Now, pursuant to the language of this notice, the FTC was announcing its determination that it would be an unfair or deceptive business practice within the meaning of Section 5 of the FTC Act for cigarette companies to fail to disclose clearly and prominently in all advertising the tar and nicotine content of the average—of the advertised cigarette in milligrams of tar and nicotine per cigarette based on the most recently published FTC test results, right?

A. Well, I mean, the—going back for a minute to the first point. This is a proposal, it's not a determination.

Q. Correct

A. And the commissioner proposes things to get public comments so it can make determinations.

And it would—but this proposal would require—would make it a violation of the Federal Trade Commission Act to fail to disclose clearly and prominently in all advertising the

tar and nicotine content of the advertised variety or—varieties and milligrams of tar.

Q. Based on—

A. Per cigarette based on the most recent published FTC test method results. Okay?

Q. Okay. Now, you said this isn't the final determination because there wasn't—this isn't in the form of a final rule, it's a proposed rule. Would the FTC propose a rule unless it had come to some sort of a decision that the proposed rule was in the public interest?

MR. SINGER: Objection to the extent it calls for speculation. To the extent you know this, you may answer.

MR. KLONTZ: Objection.

A. You know, again, it would require me to speculate. We proposed rules and don't go forward with them based on what we hear in the comment period.

BY MR. WAGNER:

Q. All right. You may learn something during the course of the comment period that could change the FTCs mind, that's always possible, right?

A. Right.

Q. But does the FTC generally or with—specifically with respect to this particular rule does it make a proposed rule without first studying and analyzing the issue?

MR. SINGER: Objection.

You may answer.

A. The Commission in proposing a rule would obviously review evidence and consider staffs arguments both for and against a rule and make a determination about whether they believed it was correct to go ahead with the publication of a proposed rule.

BY MR. WAGNER:

Q. That's what I thought. And what the FTC is seeking should—through this rule is industry-wide compliance, right?

MR. KLONTZ: Objection.

MR. SINGER: Objection.

A. Rules are promulgated to define with specificity and facilitate industry-wide compliance.

BY MR. WAGNER:

Q. Okay. And I think as we've discussed even back at the beginning of the deposition, rule making is only one means by which the FTC can obtain industry-wide compliance, there are other vehicles that the FTC can use, right?

A. That's correct.

Q. Okay. And for this particular matter another vehicle for the FTC to obtain industry compliance appeared in the form of an industry-wide agreement, right?

MR. KLONTZ: Objection.

A. That's—you know, my understanding is we propose the rule, there was a proposal for the industry for voluntary —to voluntarily adopt this pursuant to an agreement among the manufacturers and the FTC withdrew the rule.

BY MR. WAGNER:

Q. Okay. Is obtaining industry-wide compliance versus —not versus, via voluntary agreements something unique to the cigarette industry or is it something that the FTC also obtains in other industries?

A. The Commission has a number of programs designed to encourage, you know, voluntary compliance in a whole variety of industries.

Q. Okay. Is there anything nefarious about the FTC obtaining an industry-wide agreement in lieu of a formal rule?

MR. KLONTZ: Objection.

MR. SINGER: Object to form.

You may answer.

A. The—the idea of proceeding on a voluntary basis is something the Commission has done in a variety of circumstances with a variety of industries and the Commission looks at these programs to try to make sure that they are done, you know, correctly and in the public interest.

* * *

[Page 278, line 4 through Page 289, line 25]

Q. The third full paragraph on Page 2.

A. Okay.

Q. Right? Do you see that?

A. Okay.

Q. That's the quote from the article written by Dr. Pillsbury that we already referred to earlier in the deposition, right?

A. Right.

Q. Okay. Then in the next paragraph Lorillard calls the Commission's attention to a specific technological advance.

Do you see that?

A. I do.

Q. Okay. And what is the specific technological advance to which Lorillard is referring?

A. Development of air dilution systems that do not employ visible air vent holes.

Q. Right. Lorillard is calling the Commission's specific attention to the development of invisible vent holes, right?

A. Yes.

Q. Okay. So—and Lorillard is a tobacco company. It's a tobacco company that was bringing the FTC's attention to bear on the development of invisible vent holes, right?

MR. KLONTZ: Objection to this question and the last one, too.

A. Lorillard has asked the Commission to modify its test methodology to accommodate that technology, yes.

BY MR. WAGNER:

Q. By "that technology" you mean invisible vent holes, right?

MR. KLONTZ: Objection.

MR. SINGER: Objection.

A. Well, it says not visible, "do not employ visible air vent holes," so, I assume they're invisible.

BY MR. WAGNER:

Q. Okay. Now, the FTC staff considered all of the comments that they received, right?

A. Yes, they would have considered the comments they received.

Q. Okay. And in the end the FTC determined to keep the FTC test method as is for tar and nicotine testing, correct, there was no change in the insertion depth?

A. I believe that's the result.

Q. Okay. We'll now mark the March 22nd, 1978 Federal Register Notice which I think we've referred to.

(Off the record.)

(Peeler Deposition Exhibit No. 35 was marked for identification.)

BY MR. WAGNER:

Q. Peeler 35. It's a Federal Register Notice dated March 22nd, 1978. It's published in Volume 43 of the Federal Register at Pages 11856 and 11857.

Is this the Federal Register Notice you were referring to a few minutes ago?

A. This was the one I saw, yes.

Q. Okay. Now, in this Federal Register Notice, the Commission reviews a little bit of the history of the FTC test method, right?

A. Yes, they do.

Q. And they expressly reassert the original intent of the FTC test method citing the August 1st, 1967, press release, right?

A. They don't cite it, but they say when they—they refer to July 13th, 1967, made the following statement.

Q. Okay. And in that statement they are reasserting that the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker but, rather, to determine the amount of tar and nicotine generated when a cigarette is smoked by a machine in accordance with the prescribed method, right?

A. That's right.

Q. Okay. So the Commission is reemphasizing that machine smoking does not mimic or equate to human smoking, right?

A. That's correct.

Q. Okay. However, according to what the Commission is saying in this Federal Register Notice, if you assume that consumers smoke cigarettes in the same way they will, in fact, inhale tar and nicotine yields that are proportional to the FTC test method results, right?

MR. SINGER: Can you repeat the question, please?

MR. WAGNER: Sure.

BY MR. WAGNER:

Q. If one assumes that consumers smoke different cigarettes in the same way then they will inhale tar and nicotine in amounts that are proportional to the relative values that the FTC figures, that is what the FTC is emphasizing, right, or one of the points of emphasis?

A. It's—I mean, it's explaining that that's the way that current test methodology works, that only if a consumer smoked each cigarette in the same way.

Q. And in that way the FTC test method has value, right?

MR. SINGER: Objection. Pardon me.

MR. KLONTZ: Objection.

A. I don't think that they're trying to describe the value of the system here. They're just trying to describe how it works. And the point of it is to—the point of it again is to provide a uniform metric to encourage competition that would result in overall declines in tar, in machine tested tar nicotine content.

BY MR. WAGNER:

Q. Okay. And another goal is to provide consumers with a standardized base of information from which they can choose between cigarettes, correct?

A. Well, again, you know, that's the discussion we had before, but that's one way of—that's a way that I have expressed it in the past. I'm not sure that the Commission has done that. The goal of all this is to increase consumers' health and that's the issue that's being debated.

Q. And the FTC explains in this Federal Register Notice that the relationship that they are talking about, the propor-

tional values won't hold, yet consumers or smokers are covering some or all of the vent holes during smoking, right, the relationship gets complicated?

MR. SINGER: Objection.

You may answer.

MR. KLONTZ: Objection.

A. I'm—that's the point made in the next paragraph.

BY MR. WAGNER:

Q. Okay.

A. That if you cover the holes you get more than the FTC machine would.

Q. So the FTC was aware of that relationship by 1978, March of 1978, when it issued this release, right?

MR. KLONTZ: Objection.

A. Again, this release is on that date and talks about that issue.

BY MR. WAGNER:

Q. Okay. You see at the bottom of the middle paragraph, it says, "The Commission's staff followed up with a May 10th, 1977, letter soliciting comments," and "That letter was sent to the 78 persons on a staff-maintained cigarette mailing list"?

A. I do.

Q. Okay. And two paragraphs down you see, it says, "Comments were received from one government official"?

A. Yes.

Q. Okay. And if you flip the page, the second full paragraph on the left-hand column discusses continuity—historical continuity of test results, right?

MR. KLONTZ: Objection.

A. What paragraph are we on?

BY MR. WAGNER:

Q. The second full paragraph, it begins, "The Commission shares the concern expressed."

A. Okay. Well, what they're saying is two things. It's the concern expressed that a change would cause a lack of continuity and has determined not to make any changes in the absence of information indicating that a new insertion depth would be more consistent with the manner in which smokers insert cigarettes in actual use.

Q. So historical continuity of test results is something that was at least at this point important to the FTC, correct?

MR. KLONTZ: Objection.

MR. SINGER: Object to form.

You may answer.

A. Historical continuity of test results was a value and it was balanced with the lack of information about this proposed change being more consistent with the way that smokers actually use cigarettes.

BY MR. WAGNER:

Q. Okay. We're done with that episode.

At the NCI Conference in 1994, you describe a—a second occasion that focused the Commission's attention on the FTC testing protocol and this was the Barclay investigation, right?

A. That's right.

Q. Okay. The FTC began investigating advertising and marketing for Barclay cigarettes beginning in 1981, correct?

A. I don't have a date of opening. It says in the early '80s. And it says that we received the complaint in 1981.

Sometimes we're investigating before we receive complaints and sometimes we're not.

Q. Okay. Let's get the—the idea of what the investigation was about and then we'll delve into the documents.

Brown & Williamson marketed Barclay cigarettes?

A. Right.

Q. Right, we're aware of that.

And as we've seen with the insertion depth and investigation and as we talked about many cigarettes had ventilation systems that used perforated holes around the filter, right?

A. That's correct.

Q. Okay. The Barclay cigarette, though, had a different ventilation system, right?

A. That's correct

Q. Instead of holes circling the filter, the Barclay cigarette had four channels or grooves naming alongside the filter, correct?

A. That's my, understanding.

Q. Okay. And the principle was that instead of air coming in through the holes and mixing with the smoke that, as it does in with perforations, that air would flow through the channels and air and smoke would mix in the smoker's mouth and that's how the dilution would take place, right?

A. That is my understanding.

Q. The problem, though, was that when Barclay cigarettes were tested under the FTC test method procedure, the cigarette was inserted into the holder—into the holder, the channels stayed open, air would mix with the smoke and the cigarettes yielded an average of 1 milligram of tar, right?

MR. KLONTZ: Objection

BY MR. WAGNER:

Q. Well, that wasn't the problem, but—

A. That wasn't the problem. That's what—

Q. That's what happened?

A. —factually—that's factually what would happen in the FTC test method.

Q. Perfect.

However, when a smoker placed the Barclay cigarette in his or her mouth the grooves invariably collapsed?

A. That was our allegation.

Q. Okay. And when the grooves collapsed this prevented air from mixing with the smoke so that the smoker would actually receive a much different tar yield, right?

A. That was our allegations, right.

Q. Okay. And cigarette companies complained to the FTC about this, right?

A. Yes.

Q. Okay.

A. Competitors complained.

Q. Competitors complained the thought it was unfair, right?

A. I think they thought it was deceptive.

Q. Deceptive. Cigarette companies complaining about each other is hardly the stuff of conspiracies, is it?

MR. KLONTZ: Objection.

MR. SINGER: Objection. It calls for a legal conclusion. You don't have to answer that.

MR. WAGNER: Don't bother then.

MR. WILLIAMS: It was just too good not to pass up.

MR. KLONTZ: You should have waited until 5:15, I might have been asleep enough and it would have gone right by me.

MR. SINGER: I'll tell you at 7:15 we'd agree to anything.

* * *

[Page 358, line 1 through Page 369, line 8]

Q. And the FTC is aware that there were Public Health Service commercials that have echoed that same theme, correct?

A. I am not personally aware of that—

Q. Okay.

A. And I also would—I assume this is in a 1970s time frame, is that—

Q. '70s '80s, into the 1980s.

A. I'm not—I'm not personally aware of Public Health Service commercials saying that if you can't smoke you should switch—if you can't stop smoking, you should switch to low tar. I am aware of a number of commercials warning people about compensatory behavior.

Q. Okay.

A. Compensatory smoking behavior.

Q. Do you recall when those commercials were aired?

A. No, I don't. I haven't seen them on broadcast, I've seen them on tapes.

Q. Oh, I see, okay.

A. Of public service announcements.

Q. Do you recall television ads with James Earl Jones narrating them saying "There's bad and there's worse, write

for our listings, know the tar and nicotine content of your cigarette," do you recall those? Does that jog your memory? Not at all, huh?

A. No. When?

Q. I think those were in the late 1970s.

A. Okay.

Q. Okay. People can also get information regarding their cigarette choices from their doctors, right?

A. Yes.

Q. And people can get information regarding their cigarette choices from family members and friends, right?

A. Yes.

Q. And people can get information regarding their cigarette choices from teachers and coaches, right?

A. Sure.

Q. Okay. Now, with all of these sources of information, are you aware of any study, any study whether conducted by the FTC or not, that attempts to identify as a percentage or in any other way the number of low tar or light smokers who have chosen those cigarettes based on something that the tobacco company said as opposed to these other sources of information?

MR. KLONTZ: Objection.

A. I don't know how you would do that and I don't know why you would do that. The reach of mass media advertising is so far beyond the—those other forms of—of information distribution that I think you can assume that some of what consumers get is from mass media advertising. And, you know, if there's mass media advertising as playing on other, you know, preexisting beliefs or, exploiting preexisting beliefs it would still be under the Federal Trade Commission Act actionable, so—

BY MR. WAGNER:

Q. Okay.

A. —I'm not sure why you would do those studies.

Q. To your knowledge, the FTC has not done such studies, have they?

A. Trying to segment out—

Q. Right.

A. —what comes from where?

To my knowledge, we haven't and it seems like it would be very complex to try to do.

Q. Has the FTC undertaken a test to determine whether or not smokers of low tar and light cigarettes would quit if they were told about compensatory smoking behavior?

A. There have been studies that have looked at how low tar and ultra low tar cigarettes affect or potentially affect quitting behavior, but I'm not aware of any that have addressed it and this doesn't mean that there aren't, but I'm not —I'm not personally aware of any that addressed it the same way that you're talking about. And it would depend—I mean, this is really sort of a disclosure issue. It would depend on the methods is one of the things we found in our disclosure studies is that if you have two messages that seem contradictory, it's very hard for consumers to reconcile them. So—

Q. Let me ask you the question this way.

A. I'm not sure how you would do it.

Q. Okay. Let me ask you the question this way: Are you aware of any studies in which the—the FTC has tried to determine whether the existence of lights and low tar cigarettes either causes people to start smoking or causes people to not quit smoking?

A. That's an issue that the FTC is obviously interested in. I'm aware of at least one internal staff analysis of that.

Q. Was that done by Joe Mulholland?

A. Yes.

Q. Okay.

A. There were other analysis of that that have been done by other people.

Q. At the FTC?

A. Not at the FTC but outside the FTC.

MR. WAGNER: Okay. I got diverted on these comments. Let me see, because I probably only have five minutes left. I bet I can finish Barclay, right?

THE WITNESS: If you want some of John's time, you're welcome.

MR. WAGNER: I still get some time.

MR. SINGER: Take it all.

MR. WAGNER: No, no, no.

BY MR. WAGNER:

Q. The FTC had a second post Barclay proceeding that began in October of 1985, do you recall that?

A. Yes.

Q. Okay. And in that proceeding the FTC came up with a proposed alternative that included a screening process to attempt to first screen out cigarettes that were subject to compensatory smoking behavior, right?

A. I'd have to look at the verbiage to know that that sounds right.

Q. And we'll fish that out, but just let's see if I can get this done by memory, maybe it will be faster.

For those cigarettes that were subject to the problem, the FTC forwarded the idea that actually two alternative testing regimes for people to consider during this proceeding. One would be to test the cigarettes under an alternative test method; and the second would be to subject them to a two-tier test, the current FTC test method, and then one with all the vent holes taped shut.

Does that sound right with your memory?

A. I know that's one of the approaches we floated at one point. I guess, I would need to see the Federal Register Notice to make sure.

Q. Okay. After—the FTC received comments after it initiated this notice and comment period, correct?

A. Yes.

Q. Okay. And after having received all the comments and after having considered all the comments and deliberating upon them the FTC made no change to the test method, correct?

A. That's correct.

Q. The FTC reported in its tar and nicotine reports that although there have been several adaptations offered for the testing methodology none have proven to be satisfactory, correct?

A. Again, I would have to look at the language, but that sounds correct.

Q. I think as you put it in your comments to the NCI Conference in 1994, there was no clear consensus as to what to do with the FTC test method, if anything, correct?

A. That would be what I said to NCI.

Q. Okay. And there was another point that you made, right, that it would be premature to abandon the FTC testing

system since the epidemiological evidence indicated a population benefit from shifting to low tar cigarettes, correct?

MR. KLONTZ: Objection.

BY MR. WAGNER:

Q. Do you have Peeler 8 in front of you?

A. Yep.

Q. The paragraph that begins "In short"?

A. On page?

Q. 13.

A. What I—what I said was "since then-current epidemiological evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that had occurred since the 1950s," citing the 1981 Surgeon General's report.

Q. Okay. And based upon the then-current epidemiological evidence, you were stating that it would be premature to abandon the testing system, correct?

A. Yes.

Q. And if the epidemiological evidence indicates that there is a population benefit to low tar cigarettes, then, the FTC test method has value and that might call for its retention, correct?

MR. KLONTZ: Objection.

A. Could you—could you restate that?

BY MR. WAGNER:

Q. Sure.

If the epidemiological evidence suggests a population benefit, such as reduction in lung cancer deaths attributable to the decline in the average tar levels, that would be a reason to retain the FTC test method, right?

A. Well, that was certainly what we decided at that point in time and that is also the question that we have now posed to the public health agencies for an answer.

Q. That's the question that I think you testified at the very beginning of today that's still open, right, you have not come to a final determination yet?

A. Yes, we've asked—we have—the agency has decided that it's not the right place to answer that question and has asked the Public Health Service to answer that question for us. Public health agencies to answer that question for us.

Q. Okay. And, so, the FTC has not come to a final determination then yet on what to do, if anything, about the FTC test method, whether to keep it, abandon it, or revise it?

A. That's correct.

MR. WAGNER: Why don't we break for the day, then.

Thank you for all of your cooperation. I know it was a lot of documents. And we'll see you in the morning.

THE WITNESS: Wish I had been there in the 1960s.

VIDEO TECHNICIAN: Time is 5:49:39. We're going off the record. This is the end of Tape No. 4 and the end of the testimony for July 30th, 2002.

* * *

[Page 455, line 5 through Page 482, line 25]

Q. Okay. The FTC had an instance where it had to specifically deal with the issue of describing those cigarettes as low or lower in an enforcement action with American Tobacco Company, right?

A. I don't know.

Q. This is one of the actions you were talking about that the early 1970s—

A. Right.

Q. —there was an action with American Tobacco Company—

A. I know—I know that there was an action—I know it involved

Q. I'm sorry, we talked on each other.

A. I know that there was an action, I know it involved tar and nicotine, I know that the order contained mandatory provisions on tar and nicotine unlike the voluntary—the rest of the voluntary program. I don't know what the specific—I've not studied the specific allegations of the case.

Q. Okay.

(Off the record.)

(Peeler Deposition Exhibit Nos. 56 and 57 were marked for identification.)

BY MR. WAGNER:

Q. Well, I marked as Peeler 56 a copy of the complaint in Docket No. 8799 in the matter of The American Tobacco Company. And Peeler 57 will be the decision and the order in that same case.

I'm also going to mark as Peeler 58 an FTC press release dated May 22nd, 1969, that deals with the same issue.

A. Okay.

(Peeler Deposition Exhibit No. 58 was marked for identification.)

BY MR. WAGNER:

Q. Okay. Now, the complaint that was issued in the American Brands matter in 1971 involved advertising of two varieties, of Pall Mall 100's and also Lucky Filters, right?

A. I went through the legal pleadings, not the facts, so let me look.

Q. In Paragraph 2 of the complaint it refers to Pall Mall Gold 100's, Pall Mall Menthol 100's and Lucky Filters.

A. Okay.

Q. Okay. In Paragraph 4 of the Complaint the Commission specifically references affirmative statements and misrepresentations or—I apologize—in Paragraph 4 of the complaint the FTC specifically calls out numerous statements and representations as well as certain failures to disclose, right? The failures to disclose are referenced on Page 3 in the first full paragraph.

A. I wouldn't say they're numerous, but they're typical of the representations.

Q. Well, in the fourth line of Paragraph 4 doesn't the Commission refer to "numerous statements and representations"?

A. It refers to numerous statements, but the ones that set out are the typical illustrative ones.

Q. And the Commission also is basing its complaint on certain failures to disclose facts, right?

A. Appears to be.

Q. Okay. And both of those are within the FTC scope of regulatory activities, right, the power to prevent or punish both affirmative misrepresentations and omissions, correct?

A. Yes.

Q. Okay. And the gravamen of the complaint was that American Brands was making low tar and lower tar claims including comparative claims that were not substantiated, right?

A. That's correct.

Q. In fact, the complaint identifies, I think, that the cigarettes at issue had FTC test method results of 20 and 21 milligrams of tar in Paragraph 4, correct?

A. That's what it says.

Q. Okay. And that is—both of those results are higher than the comparatively low yield figure of 15 milligrams of tar that was referenced in the 1968 annual report to Congress, right?

A. Well, I mean—I mean, what the Commission is saying here and this is—this is the same legal analysis that you would bring to a comparative claim now, is that, you know, given what the market was at that point and given where these cigarettes fell in the market at that point, that an implied claim to a consumer that these cigarettes were lower in tar than other cigarettes was deceptive and the relief is designed to correct that by requiring disclosures.

Q. I agree with all of that. The simple question, though, is just 20 and 21 milligrams of tar are higher than 15, aren't they?

A. The answer to that is 20 and 21 are higher than 15, but I'm not sure I see what the relevance of it is to this particular complaint.

Q. The pluses you indicate, the range on the tar yields on the market went from 4 milligrams of tar to 36 milligrams and the particular brands at issue came in at 56th and 77th out of 122 brands tested, right?

A. That's what it says.

Q. Okay. Now, the FTC ultimately resolved this complaint with a consent order, right, that's Peeler 57?

A. That's correct.

Q. Okay. Now, the FTC did not bar or prohibit American Brands from using words such as "low, lower, reduced or like qualified terms" in its cigarette advertising, did it?

A. No, it imposed affirmative disclosure requirements on them.

Q. Right. Instead of prohibiting those terms the FTC permitted the use of those terms as long as they met certain conditions, right?

MR. KLONTZ: Objection.

A. Well, what this order does is not—this order doesn't affirmatively permit anything. What this order does is say what you can't do and it says you can't use any of these terms unless you provide a disclosure of the tar and nicotine content in the smoke produced by the advertised cigarette and if the tar content of the advertised brand is compared to that of another brand or brands of cigarettes the tar and nicotine content of—the milligrams of the smoke produced by that brand or those brands and the tar and nicotine content and milligrams of the lowest yield domestic cigarette.

BY MR. WAGNER:

Q. Okay. And if you meet those conditions, then the use of terms such as "low, lower, reduced or like qualifying terms" are not prohibited, right?

A. They're not prohibited by this order.

Q. Okay. And there's one additional aspect to the order, right, that the FTC is referring to the tar—there must be a clear and conspicuous disclosure of the tar and nicotine content in milligrams of the smoke produced by the advertised cigarette, correct, that's Condition No. 1?

A. That's correct.

Q. And the Commission defines exactly what it means by tar and nicotine content in milligrams in Section 2 of the order, right?

A. That's correct.

Q. And the FTC specifically directs that when tar and nicotine disclosures are made in milligrams it means the total particulate matter, for example, with tar, the total particulate matter in the mainstream smoke of a cigarette as determined

by the testing method employed by the Federal Trade Commission, right?

A. That's what it says.

Q. And the same thing is true for nicotine as well, right?

A. That's what it says.

Q. Okay. So the conditions on using the words "low, lower, reduced or like qualified terms" are that they must be accompanied by a statement of the tar and nicotine content in milligrams as determined by the FTC test method, right?

A. For American Tobacco Company.

Q. For American Tobacco Company, that's what this order does, that's how it resolves the case, right?

A. That's right.

Q. Okay. And the FTC did not keep this complaint and consent order private, did it?

A. No.

Q. The FTC, in fact, published it on the public record to seek comment, right?

A. I assume it did. That's the normal process.

Q. Okay. And by—

A. This is—we only have the final. There's usually an interim—

Q. Okay.

A. —agreement that's published for comment. And then the order is issued after the agreement. This says —huh.

Q. Why does the FTC publish its orders, its consent orders?

A. Can I just read the first page here?

Q. Sure.

A. Well, it's interesting, this decision and order doesn't seem to say that it was published for public comment. It normally—if it was published for public comment there's a recitation of that in the decision and order. So, you know, our current rules are settlements, administrative settlements are published for comment, but I—I don't see any indication that this was.

Q. Well, you'll have to take my representation on that. I just—

A. Okay.

Q. —took the exact order on that and it was published —and it is published in the FTC reporter, correct?

A. Okay, to go back for a minute.

Q. Yeah.

A. The process we use now is if there is an administrative settlement it's published for comment but that's only if it's a settlement. If there's a litigated settlement, they're not published for comment.

Q. Why does the FTC publish consent orders?

A. We published consent orders and other final agency actions for a whole variety of reasons, one of which is that the Administrative Procedure Act requires you to do that.

Q. Okay.

A. The other is that one of the purposes of bringing cases is to give guidance to other industry members about what type of conduct we would challenge. The one thing that is confusing sometimes to people is that an order contains—often contains provisions that are designed to fence-in conduct so that they don't necessarily—they're not necessarily—it's the complaint that states the violation of the laws and it's the—the order is a remedial provision.

Q. Okay. I want to focus on the phrase you used "to give the industry guidance." Is there any question in your mind that the publication of the decision and order in the matter of American Brands was intended to guide the industry regarding anyone's, any industry actor's use of the words "low, lower, reduced or like qualifying terms" in cigarette advertising?

A. It would be designed to do that, it would be designed to do that in the context of the ads that are challenged.

Q. Okay. And the consent order evidences the FTC's determinations regarding, among other things, the public interest made after careful study and deliberation, right?

MR. SINGER: Objection to form.

You may answer.

A. The Commission is quite deliberative about its actions.

BY MR. WAGNER:

Q. Okay.

A. The only thing I don't know about this case and maybe you do is whether this is all conduct that precedes the '67 and '70 agreement or whether this is conduct that takes place after that. And there's no—there's no—I don't—

Q. That doesn't appear on the face—

A. —allege the dates that the conduct took place on.

Q. Okay. Let's move to the next subject

In 1976, Lorillard reformulated its True king size cigarettes and sought a reformulation test to obtain current—to obtain current tar and nicotine yield information for its advertisements.

Are you familiar with this episode in FTC history?

A. No.

Q. Okay. The FTC's test method numbers differed from Lorillard's leading to an exchange and you're familiar that there is a provision in the voluntary agreement for the companies and the FTC to engage in a process when there are such differences in order to reconcile those differences, right?

MR. KLONTZ: Objection.

A. I know—I know that there are provisions in the agreement that address that and also address new cigarettes and a number of other things. I don't remember exactly what those provisions are, but that sounds right

BY MR. WAGNER:

Q. Okay. At some point during that exchange the FTC came to the—to believe that Lorillard had requested an advisory opinion of the FTC.

Now, advisory opinions is one of the vehicles or mechanisms we discussed yesterday that the FTC has available to it in order to provide industry guidance, right?

A. That's correct.

Q. Okay. Are—are advisory opinions something that are entered often?

A. They are very unusual.

Q. Very unusual.

A. Although, the extent of the—well, I—let me qualify that They have been very unusual while I've been at the FTC. They're—as we discussed before, the mix of vehicles the FTC uses varies over time.

(Peeler Deposition Exhibit No. 59 was marked for identification.)

BY MR. WAGNER:

Q. Okay. I am handing you Peeler 59 which is a printout of an "Advisory Opinion" dated September 26th, 1978. It's published at 92 F.T.C. 1035.

Have you seen this advisory opinion before?

A. No, I haven't.

Q. Okay. On its face this opinion—this advisory opinion is in response to a request for an advisory opinion "as to whether Lorillard may disseminate cigarette advertisements headlining, without qualification, a tar value higher than the latest published FTC number."

Do you see that?

A. I'm just reading it.

Q. Okay.

A. Do you have the incoming letter?

Q. No, sir.

A. No, okay.

MR. KLONTZ: Doesn't it say there was one?

MR. SINGER: I think it was just a phone call to a Commission attorney.

THE WITNESS: I'm sorry?

MR. SINGER: I think it says it was just a phone call to a Commission attorney.

BY MR. WAGNER:

Q. It says in the second sentence that it was transmitted orally.

A. Well, they—

Q. Another unusual moment in FTC history.

A. They used advisory opinions more loosely than is true now.

Okay.

Q. Okay. You've had a chance to read Peeler 59?

A. I did.

Q. Okay. Lorillard is requesting or has apparently requested an advisory opinion from the FTC to publish tar yield numbers that are higher than the latest FTC test method results, correct?

A. That's correct.

Q. And the Federal Trade Commission, in the advisory opinion refers to the 1971 voluntary agreement as creating an obligation to publish FTC test method results, correct?

A. I think what it's saying is that as a result of the voluntary agreement that the publication of a different number might be deceptive to consumers or would be deceptive to consumers.

Q. Correct. It states Lorillard's proposal would deviate from the voluntary agreement, right?

A. It's stating the Commission's view that it would be deceptive to publish a number that deviates from the voluntary agreement which seems to be reasoning that's similar to that only adopted by the court in—in the Brown & Williamson/Barclay matter.

Q. Okay. And the conclusion is pretty straight forward, isn't it, "in the Commission's opinion, tar values which are set forth in the cigarette advertisements must be consistent with the latest applicable FTC tar number," right?

A. I'm looking for that exact language, but—

Q. It's the last sentence.

A. Okay. Well, I think it's—that's the conclusion, it's qualified by the paragraph up above which is that the Commission believes it would be deceptive to advertise a different number and especially to label it as by FTC method when it's not.

Q. Right. And that remains true whether the different number would be higher or lower than the FTC test method number, right?

MR. KLONTZ: Objection.

A. That's the position taken by this advisory opinion.

BY MR. WAGNER:

Q. Okay. Now, this advisory opinion is also one of the vehicles by which the FTC can indicate to the industry the type of conduct by which it can remain in compliance with FTC policies, right?

A. Yes.

Q. Okay. Now, there's one more element to low and low tar descriptors. We've seen that from the American Brands decision, the guidance is that descriptors such as "low, lower, reduced or like qualified terms," are not prohibited if they meet the conditions set forth in that order, right?

A. The principle of American Brands, as I read it, is that if you make a claim that your product is low or lower and consumers imply from that a comparison to other cigarettes that unless your cigarette is at the low end of the FTCs testings—testing numbers—well, it doesn't say that, it says if it's in the middle of the FTC's testing numbers or at the high end of the FTC's testing numbers that that would be deceptive.

And the descending statement says—I think they're just talking about their own brand, that they've lowered the tar and nicotine content of their own brand and the majority saying "we see a comparative claim here of all cigarettes." So

that's what the K stands for. The remedy in the case is to say whenever you use one of those terms you've got to give information necessary to allow consumers to understand what you're saying. So the effect of that remedy would be to make clear that the claim is only about your cigarette and it's not a claim about should—the fact that remedy should be to make clear that your claim is only about your cigarette and not a comparative claim to other cigarettes.

Q. Okay. One of the requirements when a claim such as "low, lower, reduced or like qualifying term" is used is that the tar and nicotine content in milligrams pursuant to FTC test method be disclosed, correct?

A. Correct. And then to make sure that there's no mis—it appears to make sure that there's no misapprehension that it's also lower or low. On an absolute basis, you include a disclosure of here's what the low end of the market looks like.

Q. Okay.

A. And the low end of the market would be whatever the lowest is based on the most recent FTC test—

Q. Okay.

A. —as I—as I read the order.

Q. The order says if there is a direct comparison with other cigarettes you need to disclose the tar and milligram—the tar and nicotine content in milligrams of whatever cigarette you're comparing it to by using those FTC test method results as well, right?

A. Yeah, whatever one you're—and also the—are there two or three?

Yeah, if you're comparing it to a specific brand, the tar and nicotine content of the specific brand, but also the tar and nicotine content of the lowest yield domestic cigarette.

Q. Okay. So under the American Brands decision, one element, just one of the elements, is if you're going to use words like "low, lower, reduced or like qualifying terms," you must disclose the tar and nicotine content in milligrams of the cigarettes you're advertising using FTC test method results, correct?

A. That's correct.

Q. Okay. And in the Lorillard advisory opinion we see the FTC giving guidance that says "and only FTC test method results may be used, do not use any other test method results," correct?

A. Well, in the context of an ad where it's going to say by FTC method.

Q. Right.

A. And if you say by FTC method, I mean, again, that goes back to the Brown & Williamson.

Q. I understand.

That comes a little bit later, but as long as you're going to say by FTC test method, which is part of the voluntary agreement, and you're going to use only FTC test method numbers, right?

A. Right.

MR. WAGNER:

Okay. Now, we have to change the tape, then I get to the next element.

THE WITNESS: Okay.

VIDEO TECHNICIAN: The time is 11:18:20. We're going off the record. This is the end of Tape No. 5. We move on to Tape No. 6.

(Recess taken.)

VIDEO TECHNICIAN: Time is 11:25:59. This is the beginning of Tape No. 6 and we're back on the record.

BY MR. WAGNER:

Q. Okay. Back when the FTC adopted the FTC test method in 1967 it announced that a machine-based testing system does not and was not intended to approximate, mimic or predict actual human intake of tar and nicotine when smoking, right?

A. That's correct.

Q. Okay. And at the conclusion of the inquiry or proceeding relating to the insertion depth of cigarettes that we talked about yesterday, the FTC reiterated that concept in its Federal Register Notice in 1978?

A. That is correct.

Q. Okay. Now, in 1993 and 1994, though, American Tobacco Company was advertising its Carlton cigarettes and those cigarettes were rated as yielding 1 milligram tar under the FTC test method.

Do you recall that?

A. I do.

Q. Okay. And the advertisements were comparing the Carlton cigarettes to other brands such as Marlboro Red King size and Camel and Winston and Kent and Vice Roy each of which were rated at something greater than 10 milligrams tar under the FTC test method.

Do you recall that?

A. I do recall that.

Q. Okay. And using those numbers, just the FTC test method numbers as they were, American Brand—American Brands ran—I'm sorry, American Tobacco Company ran some ads claiming, for example, 10 packs of Carlton have less than one pack of these other brands.

Do you recall that?

A. I do recall that.

Q. And another ad was a whole carton of Carlton had less tar than one pack of these brands, does that—

A. Correct.

Q. —jog your memory?

A. Yes.

Q. And a third ad was 10 to 1, 10 packs of Carlton had less tar than one pack of these brands?

A. Sounds right.

Q. Okay. Now, the FTC decided to bring an action against these ads, correct, against American Tobacco Company, claiming that these ads could not be substantiated and could cause consumer confusion, correct?

A. FTC staff initiated investigation and obtained an agreement and—settlement agreement and the F—the Federal Trade Commission adopted that agreement and published it for comment and finalized it.

Q. Okay. The issue there was American Tobacco Company's presentation of Carlton as a numerical multiple fraction or ratio of the tar of other brands of cigarettes, right?

A. Is that from our complaint?

Q. It is.

A. Okay.

Q. All right Now, in plain English those words meant that the FTC was of the view that it was improper for American Tobacco Company to make a representation that smokers actually would get one-tenth the tar when they smoked Carlton as opposed to another brand, right?

A. That's correct.

Q. Okay. And this was because humans don't necessarily smoke like machines and humans can engage in compensatory smoking behavior when they smoke various brands of cigarettes, right?

MR. KLONTZ: Objection.

A. That's correct. And—and that's not what the—you know, certainly by that point everybody was aware that the FTC numbers do not act as ordinal—don't rank cigarettes—they rank cigarettes in rough order, but they don't—you don't—it's not like you get half as much tar and nicotine from a 5 milligram cigarette as from a 10 milligram cigarette.

BY MR. WAGNER:

Q. Okay. And so through this consent order American Tobacco Company and the guidance that are provided to the industry was that the FTC was proscribing or prohibiting exact numerical representations regarding the actual tar and nicotine that a cigarette would yield when actually smoked, right?

A. If you have a copy of it, I can tell you exactly what we did. But the general thrust of it was to say you can't in your advertisements say or suggest the very point that everybody understands, which is that these are not numerical—when I say everybody, the government and the industry understands that these are not numerical equivalence. That—that the fact that the ratings don't mean that there's 10 times less or 10 times more. That the—you know, the differences are often far less.

Q. And in accordance with that understanding, the FTC was of the view that it would be unfair or deceptive for cigarette manufacturers to state or imply in their advertising that any particular smoker would get any particulate amount of tar and nicotine from a cigarette?

A. Well, what the FTC decides is the particular advertisements is challenging or deceptive or unfair and it decided

that those advertisements were deceptive, unfair, and they said and here's why.

Q. Okay. And—and the why is that the machine yields do not equate with human smoking and smokers can engage in compensatory smoking behavior, correct?

MR. KLONTZ: Objection.

A. And that was deceptive in light of representations that were made in the ad.

BY MR. WAGNER:

Q. And the specific recommendations being made in the ad were that people would get a particular amount of tar and nicotine when they smoked the Carlton cigarettes?

A. That's what we alleged the ad said.

Q. Okay.

A. It was a settlement so American Tobacco did admit that that had happened.

Q. Okay. And the FTC published this consent order, correct?

A. Correct.

Q. And, so, this is another example of an order that can constitute industry guidance so that we can get other industry actors to conform their conduct with FTC policies, right?

MR. KLONTZ: Objection.

A. That's right.

BY MR. WAGNER:

Q. Okay. Now, you're also familiar, are you not, with the practice of certain cigarette manufacturers labeling certain varieties of cigarettes as lights cigarettes?

A. Yes, I am.

Q. Okay. Now, the FTC has—well, the FTC has been aware that cigarette ads and cigarette brand names have used the word "light" as a descriptor, correct?

A. Yes, we have been.

Q. That wasn't a secret, was it?

A. No.

* * *

[Page 587, line 6 through Page 590, line 25]

Q. Do you know whether or not the FTC staff has come to a determination as to whether or not compensation is complete?

A. I don't know—I know the FTC staff has not—would not have come to a determination on that. Whether individual staff members have views on that is something I don't know.

Q. Okay. And just so we can confirm it, I probably asked it before, but in case I hadn't, the proceeding that was initiated by the Federal Register Notice from September of 1997 resulted in the request that the FTC made to the Department of Health and Human Services and that matter is still open, correct?

A. That's correct.

MR. WAGNER: Okay, thank you very much, Mr. Peeler. I'm going to turn the—the table over to Mr. Williams who is going to continue. Thank you very much for hanging in there with the documents.

THE WITNESS: Okay.

MR. WAGNER: I appreciate it.

VIDEO TECHNICIAN: Time is 2:27:08. We're going off the record.—

(Recess taken.)

(Peeler Deposition Exhibit No. 78 was marked for identification.)

VIDEO TECHNICIAN: Time is 2:41:04. We're back on the record.

EXAMINATION BY COUNSEL FOR THE R.J. REYNOLDS DEFENDANTS BY MR. WILLIAMS:

Q. Good afternoon, Mr. Peeler.

A. Good afternoon, John.

Q. As you know we've changed attorneys and as you also know I represent R.J. Reynolds.

During the break when we were changing you indicated something to Mr. Wagner about the line of questioning he had just completed and we thought probably best for you to put that on the record now.

A. That's right. I was—I wanted to clarify to Mr. Wagner that if the Federal Trade Commission had reached a decision that a hundred percent compensation was occurring with respect to smoking, it would not continue the system because there would be no value in it at all. So, you know, the whole issue of how much compensation of what health benefits are is what the Commission's examining now.

Q. It would not continue which system?

A. The tar and nicotine testing system.

Q. Okay.

MR. WILLIAMS: Jeff, do you have any follow-up?

BY MR. WILLIAMS:

Q. All right. Is it all right if we move away from low tar cigarettes for a little while?

A. I was just getting interested in it.

MR. SINGER: What's left?

BY MR. WILLIAMS:

Q. Mr. Peeler, I'd like to start by asking you about how the FTC in its law enforcement capacity goes about monitoring the advertising and marketing practices of the tobacco industry, and during the break I asked you to look at a letter.

Now, the letter is not dated, but it's Exhibit 78 for identification. And it appears to be a letter from Paul Rand Dixon, Chairman of the Federal Trade Commission, to John H. Banzhaf, B-A-N-Z-H-A-F, the III, who is the Executive Director Action on Smoking and Health.

Do you see that?

A. I do see that.

Q. The letter is undated, but it appears to respond to Mr. Banzhaf's letter of July 17th, 1969, and appears to describe the advertising monitor program that the FTC had back in 1969.

Do you see that?

A. Yes, I do.

Q. Okay. For starters, let me ask this, the final page has Mr. Dixon's signature and it states "By direction of the Commission." What does that mean?

A. That means that this is a statement by the Commission that the commissioners would have voted on it.

* * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-8023EALR

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION, AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

Appeal from the United States District Court
for the Eastern District of Arkansas

The petition for permission of Lisa Watson, et al., to take an interlocutory appeal pursuant to 28 U.S.C., section 1292(b) has been considered by the court and is granted. The clerk will regularly docket the appeal.

January 28, 2004

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit

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FEB 23 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(10)

No. 05-1284

IN THE
Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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February 23, 2007

QUESTION PRESENTED

Whether a private actor doing no more than complying with federal regulation is a "person acting under" a federal officer for the purpose of 28 U.S.C. § 1442(a)(1), entitling the actor to remove to federal court a civil action brought in state court under state law.

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INTRODUCTION

For nearly two centuries, the federal officer removal statute has provided federal officers, and those aiding or assisting them in enforcing federal law, a statutory right to remove state-law actions to federal court. The statute has fulfilled a narrow, yet important, role. It gives federal officers, and those acting with them, a right to a federal forum as a safeguard against state judicial actions that, especially during times of discord between States and the federal government, could interfere with the enforcement and operation of national laws. *See Tennessee v. Davis*, 100 U.S. 257, 262-63 (1880); *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). The federal officer removal statute protected customs officers enforcing the embargo against England during the War of 1812, federal revenue officers enforcing the "Tariff of Abominations" during the nullification crisis of 1833, and federal revenue officers enforcing the Nation's prohibition laws in the 1920s.

This case began as a class action brought in state court under Arkansas law based on Philip Morris's fraudulent marketing and sale of so-called "light" cigarettes. Notwithstanding the well-defined history and narrow purposes of the federal officer removal statute, Philip Morris — a private commercial actor — invoked the statute to remove the case to federal court. The thrust of Philip Morris's removal claim was that the Federal Trade Commission's ("FTC's") supposedly extensive regulation of Philip Morris's light cigarettes has rendered Philip Morris a party "acting under" a federal officer within the meaning of 28 U.S.C. § 1442(a)(1). Indeed, Philip Morris insisted that this "is exactly the type of case for which the federal officer removal statute was created." Appellee's Br. 34. The Eighth Circuit agreed with Philip Morris's deeply flawed interpretation of the statute in a holding that is at odds with the text, history, and purposes of the statute and the FTC's actions. This Court should reverse.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-19a) is reported at 420 F.3d 852. The district court's opinion denying petitioners' motion to remand (Pet. App. 20a-60a) is unreported (but available at 2003 WL 23272484).

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2005. A petition for rehearing was denied on November 18, 2005. *See* Pet. App. 61a. On February 9, 2006, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 20, 2006, and on March 14, 2006, he further extended the time within which to file a petition to and including April 17, 2006. *See id.* at 100a-101a. The petition for a writ of certiorari was filed on April 7, 2006, and was granted on January 12, 2007 (127 S. Ct. 1055). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutes are set forth at App., *infra*, 1a-2a.

STATEMENT OF THE CASE

1. The federal officer removal statute, 28 U.S.C. § 1442(a), governs the removal from state court to federal court of criminal and civil actions in which federal officers and agencies are defendants. The statute provides for removal when "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof" is "sued in an official or individual capacity for any act under color of such office." *Id.* § 1442(a)(1). In permitting federal officers to remove civil actions brought under state law, § 1442(a)(1) functions as "an exception to the 'well-pleaded complaint' rule, under which (absent diversity) a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2155 n.12 (2006) (internal quotation marks

omitted); *see generally Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

Although the federal officer removal statute's long history has been recounted by this Court, *see Willingham v. Morgan*, 395 U.S. 402, 405 (1969), a brief recitation nonetheless helps to place this case in historical context. Congress enacted the "primordial officer removal statute" as part of the Customs Act of 1815. *City of Greenwood v. Peacock*, 384 U.S. 808, 820 n.17 (1966). The removal provision "was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular," and was intended "to protect federal officers from interference by hostile state courts." *Willingham*, 395 U.S. at 405; *see also* William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 Am. J. Legal Hist. 333, 337 (1969) (during the War of 1812, "New England shipowners harassed federal customs officers by vexatious lawsuits," which prompted the Customs Act of 1815).

The Act provided that a customs collector, in enforcing the embargo, could "employ within his district such number of proper persons, as inspectors of the customs, as he . . . judge[d] necessary." Act of Feb. 4, 1815, ch. 31, § 5, 3 Stat. 195, 197. Moreover, the customs collector, "when proceeding to make any search or seizure authorized by [the Act]," was "empowered to command any person . . . within ten miles of the place where such search or seizure shall be made, to aid and assist such officer in the discharge and performance of his duty therein." *Id.* § 6, 3 Stat. 197. The statute provided a right of removal to both the customs collector and "any other person aiding or assisting" the collector in enforcing the embargo. *Id.* § 8, 3 Stat. 198. This original removal provision expired at the end of the war. *See Willingham*, 395 U.S. at 405.

Congress enacted the next iteration of a federal officer removal statute in the Force Act of 1833, which was passed "in consequence of an attempt by [South Carolina] to make penal the collection by United States officers

within [South Carolina] of duties under the tariff laws." *Tennessee v. Davis*, 100 U.S. 257, 268 (1880); *see* Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633-34. The Force Act carried forward the "other person" clause from the Customs Act of 1815, providing for removal "in any case . . . commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States." Force Act § 3, 4 Stat. 633.

Congress enacted a series of removal provisions during the Civil War. *See Willingham*, 395 U.S. at 405-06; *see also* Act of Mar. 8, 1863, ch. 81, § 5, 12 Stat. 755, 756; Act of June 30, 1864, ch. 173, § 50, 13 Stat. 223, 241. Of particular relevance, in enacting the Revenue Act of 1866, Congress adopted a removal statute using the "acting under" clause found in the current statute. *See* Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171.

Congress amended the statute several times prior to 1948,[1] at which time it was amended, as a part of the Judicial Code of 1948, to include all federal officers. *See Willingham*, 395 U.S. at 406. The House Committee Report accompanying the 1948 revision explained that the revised section was "extended to apply to all officers and employees of the United States or any agency thereof." H.R. Rep. No. 80-308, at A134 (1947).

Finally, in 1996, Congress responded to this Court's decision in *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), by amending § 1442(a)(1) to include federal agen-

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[1] Congress extended the statute in 1875 to provide a right of removal for an officer of Congress in "the discharge of his official duty, in executing any order of [either House of Congress]." Act of Mar. 3, 1875, ch. 130, § 8, 18 Stat. 371, 401. The statute was amended in 1916 to give a right of removal to "any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer." H.R. Rep. No. 64-776, at 1 (1916).

cies. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850.

2. The Federal Trade Commission Act ("FTC Act") prohibits "unfair or deceptive acts or practices in or affecting commerce," directs the FTC to prevent persons from engaging in such acts or practices, and authorizes the FTC to prescribe rules to "define with specificity acts or practices which are unfair or deceptive." 15 U.S.C. §§ 45(a)(1)-(2), 57a(a)(1)(B). Although its law-enforcement and rulemaking authority extends to the marketing and sale of tobacco products, the FTC has never prescribed regulations governing the tobacco industry.

In the 1950s, the FTC began investigating inaccuracies in cigarette advertising about tar and nicotine. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985). That inquiry was triggered by the industry's new advertising emphasis: "In response to the emerging scientific evidence that cigarette smoking posed a significant health risk to the user, . . . major cigarette manufacturers began widespread promotion of filtered cigarettes to reassure smokers" about the health effects of smoking. National Inst. of Health, *The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes*, at iii (Aug. 1996) (JA 66).

By the mid-1960s, "the FTC became concerned about the absence of a standard method for testing cigarette delivery of tar and nicotine." *Brown & Williamson*, 778 F.2d at 37. In 1966, the FTC issued a policy statement explaining that a cigarette maker's factual statements regarding tar and nicotine content, if based on the "Cambridge Filter Method," would not be deemed deceptive so long as there were no express or implied representations that the levels of tar and nicotine reduced or eliminated health hazards. *See* News Release, Federal Trade Commission (Mar. 25, 1966) (JA 20-21).

The Cambridge Filter Method "utilizes a smoking machine that takes a 35 milliliter puff of two seconds' dura-

tion on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length." *Brown & Williamson*, 778 F.2d at 37. The method is intended to "provide[] an objective basis for assessing the relative amounts of tar and nicotine different cigarettes will deliver when they are smoked in the same way." *Id.* In 1967, the FTC opened a cigarette testing laboratory using the Cambridge Filter Method. *See* Notice, *Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11,178 (1967).[2]

In 1970, the FTC sought comment on a formal Trade Regulation Rule that would have made it "an unfair or deceptive act or practice . . . to fail to disclose, clearly and prominently, in all advertising the tar and nicotine content [of cigarettes]" based on the Cambridge Filter Method. Notice of Proposed Rulemaking, *Advertising of Cigarettes*, 35 Fed. Reg. 12,671, 12,671 (1970). Later that year, five leading cigarette companies, including Philip Morris, voluntarily undertook — in an industry agreement to which the FTC was not a party — to disclose in their advertising tar and nicotine data culled from FTC test results. *See* Federal Trade Commission, *Report to Congress*, App. C (Dec. 31, 1970). The FTC subsequently suspended its rulemaking. *See Brown & Williamson*, 778 F.2d at 37.

3. Petitioners Lisa Watson and Loretta Lawson brought this civil action against Philip Morris in Arkansas state court for violations of Arkansas law. On behalf of a class of all persons who purchased two brands of light cigarettes — Marlboro Lights and Cambridge Lights — petitioners allege that Philip Morris engaged in unfair and deceptive consumer practices in connection with the marketing and sale of its light cigarettes.

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[2] Since 1987, when the FTC closed the laboratory, most testing of tar and nicotine levels has been conducted by a private laboratory funded by tobacco companies. *See* Notice, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. 48,158, 48,158 n.5 (1997).

Petitioners allege that Philip Morris, "[w]hile marketing and promoting decreased tar and nicotine deliveries, . . . designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the [Cambridge Filter Method] . . . than would be delivered to the consumers of the product." Pet. App. 63a-64a (¶ 9). Petitioners also allege that Philip Morris falsely represented its cigarettes as light or low tar by, among other things, "[d]escribing [its] product as light when the so-called lowered tar and nicotine deliveries depended on deceptive changes in cigarette design and composition," "[i]ntentionally manipulating the design and content" of its cigarettes to lower artificially the results of the testing method used to measure tar and nicotine levels, and "[e]mploying techniques that . . . actually increas[e] the harmful biological effects" caused by tar in cigarettes. *Id.* at 64a-65a (¶¶ 12-13). Petitioners seek relief under the Arkansas Deceptive Trade Practices Act (Counts I and II). *See* Ark. Code Ann. §§ 4-88-101 *et seq.*

Philip Morris removed the action to federal court, invoking the federal officer removal statute. Philip Morris argued that removal by a "private party [is appropriate] where it is sued for actions taken under the direction of a federal officer." Pet. App. 76a. It maintained that "[t]he 60-year history of FTC mandates" caused it to be a person "acting under" a federal officer. *Id.* at 88a.

In their motion to remand to state court, petitioners argued that their claims challenged not the FTC's testing procedures "but rather the company's deceptive practices in labeling its products as low tar and nicotine . . . accomplished by manipulation of the [FTC] testing procedures." Appellants' Br. xii (citing Motion for Remand ¶¶ 4-5). Petitioners further contended that Philip Morris's marketing of light cigarettes, even if subject to FTC regulation, did not make the company a person "acting under" a federal officer for purposes of the removal statute. *Id.*

The district court denied petitioners' motion to remand. The court held that "Philip Morris acted under the direc-

tion of a federal officer within the meaning of § 1442(a)(1) when it cited the tar and nicotine values derived from the FTC Method in its [cigarette] advertisements," because FTC "regulation of cigarette testing and advertising spans over forty years and is detailed and specific." Pet. App. 41a. Recognizing that the removal issue had divided the federal courts, the court certified the question for interlocutory review under 28 U.S.C. § 1292(b). *See id.* at 57a-60a.

4. The Eighth Circuit affirmed. The court first stated that it was obliged not to give § 1442(a)(1) a "'narrow' or 'limited' interpretation." Pet. App. 4a. It then ruled that whether the "acting under" clause is satisfied depends on the "detail and specificity of the federal direction of the defendant's activities." *Id.* at 6a. Relying by analogy on the Fifth Circuit's decision in *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 398 (5th Cir. 1998) — a case involving a government contractor — the Eighth Circuit held that the FTC subjected Philip Morris to "comprehensive, detailed regulation" and that Philip Morris therefore satisfied the "acting under" clause. Pet. App. 7a-8a.

The court found it irrelevant that the FTC "regulations" that Philip Morris claimed rendered it a federal officer were never adopted and that the industry acted by voluntary agreement. The court explained that "[t]he FTC effectively used its coercive power to cause the tobacco companies to enter the agreement." *Id.* at 10a.

The Eighth Circuit also found a causal connection between the challenged conduct of Philip Morris and the acts regulated by the FTC. The court held that, based largely on two consent orders entered into by the FTC and other tobacco companies, petitioners' complaint both "directly implicates the enforcement and wisdom of the FTC's tobacco policies" and "challenge[s] the FTC's policy judgment that despite the failure of the Cambridge Filter Method . . . the test results should still be included in advertising." *Id.* at 15a-16a.

In addition, the Eighth Circuit decided that, although petitioners' claims arose entirely under Arkansas law, Philip Morris had a colorable federal preemption defense that supported its claim to removal. *See id.* at 16a-18a.

SUMMARY OF ARGUMENT

I. Section 1442(a)(1) permits removal when a federal officer, "or any person acting under that officer," is "sued in an official or individual capacity for any act under color of such office." A private party "act[s] under" a federal officer by assisting the officer in carrying out the officer's official duties, not by simply complying with federal regulation. That interpretation is confirmed by the statute's "color of office" clause, which limits removal to cases in which the defendant is sued for acts taken in the exercise of official authority. A private commercial actor, even one subject to extensive federal regulation, cannot sensibly be said to act "under color of [federal] office."

The history and purposes of the federal officer removal statute likewise make clear that the statute does not apply to private regulated commercial actors. The statute was designed to protect federal officers from state-court civil or criminal actions that, because of the costs and burdens of litigation in remote locations and the risk of anti-federal prejudice, could hinder the *enforcement* of unpopular federal laws. *See Willingham v. Morgan*, 395 U.S. 402, 406 (1969). That purpose has no application to a private commercial actor sued for acts undertaken in *compliance* with federal law. A party that is the *object* of regulatory enforcement, such as Philip Morris, will not face hostility directed at those who *enforce* unpopular federal laws.

Further, "one of the most important reasons for [federal officer] removal is to have the validity of the defense of official immunity tried in a federal court." *Id.* at 407. That purpose has no application to private regulated commercial actors because they have no defense of qualified immunity for commercial acts undertaken in compliance with federal regulation.

Decisions of this Court confirm that the "acting under" clause is limited to those who aid or assist federal officers in performing official functions. *See Davis v. South Carolina*, 107 U.S. 597, 599-600 (1883); *Maryland v. Soper*, 270 U.S. 9, 30-32 (1926); *City of Greenwood v. Peacock*, 384 U.S. 808, 820 n.17, 823 n.20 (1966). Under that standard, a private commercial actor, such as Philip Morris, has no claim to federal officer removal, regardless of the comprehensiveness or detail of federal regulation.

II. The justifications given by the Eighth Circuit for its "comprehensive regulation" test are unsound. The court made no effort to ground its interpretation of "acting under" in the text, structure, or purposes of the statute. Instead, the court mistakenly read this Court's decisions as requiring it to give a broad interpretation to the "acting under" clause. Properly understood, the clause should be interpreted strictly, in keeping with the longstanding view that removal is an extraordinary procedure. *See Colorado v. Symes*, 286 U.S. 510, 518 (1932); *Screws v. United States*, 325 U.S. 91, 111-12 (1945) (plurality).

The Eighth Circuit's test would substantially, and unnecessarily, expand the removal jurisdiction of federal courts. Scores of private commercial actors face regulation at least as comprehensive and detailed as that experienced by Philip Morris. Under a comprehensive-regulation test, such actors could frequently invoke the removal jurisdiction of federal courts, thereby threatening the legitimate interests of States in having state-law actions adjudicated in state courts and unnecessarily stretching the federal judiciary's resources.

III. Even under the Eighth Circuit's test, or any standard that attaches weight to the comprehensiveness and detail of federal control, Philip Morris is not entitled to federal officer removal.

First, although the FTC has broad authority to adopt industry-wide trade rules, it has never adopted a *single* regulation pertaining to light cigarettes. The 1970 agreement by leading cigarette makers to disclose tar and

nicotine content in advertising was voluntary, and the FTC lacks any authority to enforce it. The FTC has thus never mandated the use of the Cambridge Filter Method, nor has it defined descriptors, such as "light" or "low tar," much less heavily regulated their use.

Second, and contrary to the Eighth Circuit's view, the FTC's history of cigarette testing does not represent an extraordinary level of federal regulation. Such product testing, whether by public or private actors, is a common feature of many regulatory regimes.

Third, the Eighth Circuit erred in according substantial weight to consent orders that the FTC entered into with *other* tobacco companies. The text and structure of the FTC Act, decisions of this Court, and the FTC's long-standing practice all make clear that FTC consent orders bind only the parties to the order and do not function as industry-wide regulations.

ARGUMENT

I. THE FEDERAL OFFICER REMOVAL STATUTE PROTECTS ONLY THOSE AIDING OR ASSISTING FEDERAL OFFICERS IN PERFORMING OFFICIAL DUTIES

The "acting under" clause of § 1442(a)(1) encompasses private actors only insofar as they are assisting federal officers in performing official duties. It does not protect private commercial actors complying with federal regulation, regardless of the level of regulatory control. That conclusion follows from the text, history, and purposes of the statute, as well as from decisions of this Court construing antecedents to § 1442(a)(1).

A. The Text Of The Federal Officer Removal Statute Shows That It Is Limited To Private Parties Assisting In Performing Official Duties

1. The statute provides that a state-court civil action or criminal prosecution may be removed to federal court by "[t]he United States or any agency thereof or any officer (or any person *acting under* that officer) of the United

States or of any agency thereof, sued in an official or individual capacity for any act *under color of such office*." 28 U.S.C. § 1442(a)(1) (emphases added).

As a straightforward textual matter, a private party "act[s] under" a federal officer within the meaning of § 1442(a)(1) when the party assists or acts on behalf of a federal officer in performing an official function. To "act under" means to act as a subordinate or agent of another, subject to the other's control or supervision in exercising the other's authority. *See Random House Unabridged Dictionary* 2059 (2d ed. 1993) (defining "under" as "subject to the authority, direction, or supervision of; *a bureau functioning under the prime minister*"); *Webster's Third New International Dictionary* 2487 (2002) (defining "under" as "subject to the bidding or authority of: led by <served [under] three colonels>").[3] A person cannot sensibly be said to "act under" a federal officer without exercising official authority in carrying out a governmental function.

The adjoining text bolsters that common-sense reading of "acting under." A person acting under a federal officer may remove an action only if sued in state court for an "act *under color of such office*." 28 U.S.C. § 1442(a)(1) (emphasis added). The "color of office" clause informs the meaning of the preceding "acting under" clause. *See Neal v. Clark*, 95 U.S. 704, 708 (1878) ("It is a familiar rule in the interpretation of . . . statutes that a passage will be

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[3] *Cf., e.g., Gnerich v. Rutter*, 265 U.S. 388, 391 (1924) (explaining that "agents or subordinates of the Commissioner of Internal Revenue" "act under" the Commissioner by being "responsible to him" and "abid[ing] by his direction" such that "[w]hat they do is as if done by him"); *Chicago Deposit Vault Co. v. McNulta*, 153 U.S. 554, 561 (1894) ("The receiver being an officer of the court, and *acting under* the court's direction and instructions, his powers are derived from and defined by the court under which he acts.") (emphasis added); *Beard v. Burts*, 95 U.S. 434, 437-38 (1877) ("[i]t is a legitimate presumption that agents who act for and on behalf of an army in the field are *acting under* the authority of its commander") (emphasis added).

best interpreted by reference to that which precedes and follows it.") (internal quotation marks omitted).

This Court has held that the "color of office" clause requires "a causal connection between the charged conduct and asserted *official authority*." *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (internal quotation marks omitted, emphasis added). Similarly, in *Willingham v. Morgan*, 395 U.S. 402 (1969), this Court said that the clause "cover[s] all cases where federal officers can raise a colorable defense *arising out of their duty to enforce federal law*." *Id.* at 406-07 (emphasis added). Those cases suggest that removal is appropriate only in those circumstances involving the exercise of federal authority or the enforcement of federal law. The "color of office" clause, in that way, evinces Congress's expectation that a removing party — whether a federal officer or one "acting under" a federal officer — will have some claim to have been acting in an official capacity in carrying out public functions.

The "color of law" requirement of 42 U.S.C. § 1983 underscores that point. In *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999), this Court held that "the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct." *Id.* at 50 (internal quotation marks omitted). To act under "color of law" requires that a private party have "exercis[ed] power 'possessed by virtue of . . . law and made possible only because the [party] is clothed with the authority of . . . law.'" *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Although those decisions do not directly construe § 1442(a)(1), a plurality of this Court has said that the "color of office" requirement is *stricter* than the "color of law" requirement of § 1983. *See Screws v. United States*, 325 U.S. 91, 111-12 (1945) (plurality).

Those "color of law" decisions show why a private party like Philip Morris cannot reasonably be said to "act under" a federal officer or to operate "under color of [federal] office" merely by engaging in commercial conduct subject

to federal regulation: When a private party complies with regulation, it neither exercises authority vested in it by law nor is clothed with governmental authority. Were it otherwise, Philip Morris, in marketing and selling light cigarettes, would be subject to the constitutional restraints applicable to state actors. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) ("governmental authority may dominate an activity to such an extent that its participants must . . . be subject to constitutional constraints"). Philip Morris itself has argued that federal regulation does not render it a state actor, and the Third Circuit has agreed, holding that, notwithstanding "federal[] regulat[ion]" of cigarettes, Philip Morris is a private commercial actor, not a federal agent, engaged in "a private rather than public . . . function." *Brown v. Philip Morris Inc.*, 250 F.3d 789, 802 (3d Cir. 2001).[4]

For these reasons, private parties "acting under" federal officers are those exercising or clothed with governmental authority by virtue of aiding or assisting federal officers in the performance of official duties.

2. The statutory lineage of the current "acting under" clause in § 1442(a)(1) makes clear that those "acting under" a federal officer are those who aid or assist federal officers. The "acting under" formulation, which Congress first used in 1866, "obviously drew on the comparable characterization of the 'other person' in the Customs Act of 1815." *City of Greenwood v. Peacock*, 384 U.S. 808, 823 n.20 (1966); *see Findley v. Satterfield*, 9 F. Cas. 67, 68 (C.C.N.D. Ga. 1877) (No. 4792) (noting the statutory asso-

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[4] This Court's state-actor precedents confirm that a private regulated party has no claim to be acting under the authority of a federal officer. Under settled principles, "extensive and detailed" regulation of a private actor does not "convert [the private actor's] action into that of the State for the purposes of the Fourteenth Amendment." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *see also Sullivan*, 526 U.S. at 52 (Court has "consistently held" "[i]n cases involving extensive state regulation of private activity" that regulation does not render private entity state actor); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("extensively regulated" nursing home was not state actor).

ciation among the Customs Act of 1815, the Force Act of 1833, and the Revenue Act of 1866); Wiecek, 13 Am. J. Legal Hist. at 337 (noting that the "1815 [Customs] Act set an important precedent for subsequent removal legislation"); *see also Sutherland on Statutory Construction* § 51.02, at 121 (5th ed. 1992) ("It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter.")

The "other person" in the Customs Act of 1815, in turn, clearly referred to "inspectors of the customs" who were *employed* by the customs collector, § 5, 3 Stat. 197, and private persons who "*aid[ed]* and *assist[ed]*" the customs collector "in the discharge and performance of his duty," *id.* § 6, 3 Stat. 197 (emphases added). As a straightforward textual matter, then, a party qualified as an "other person" under the Customs Act of 1815 or as one "acting under" a federal officer in the Revenue Act of 1866 when he or she aided or assisted or acted as an employee of a federal officer. Nothing in Congress's use of the "other person" or "acting under" clause ever suggested an intent to afford a right of removal to private commercial actors who were merely complying with (rather than assisting a federal officer in enforcing) federal law.

Furthermore, no evidence, textual or otherwise, suggests that Congress intended, in enacting any of the subsequent versions of the statute since 1866, to sever the equivalence between the class of actors qualifying as "acting under" a federal officer and the class of actors fitting within the category of "other person" in the Customs Act of 1815. *See* Stanley I. Kutler, *Judicial Power and Reconstruction Politics* 145-46 (1968). Section 1442(a)(1) — which has the same "acting under" language as the 1866 Act — must therefore be construed in keeping with that settled historical meaning. *Cf. Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 541-42 (1954) (holding that subsequent statute authorized President to enforce wage stabilization requirement based on similar provision of prior statute, on ground that "[t]o read the [subsequent

statute] without reference to th[e] model [of the prior statute] is to read it out of the context in which Congress enacted it").[5]

B. The History And Purposes Of The Federal Officer Removal Statute Confirm That The "Acting Under" Clause Applies Only To Those Who Aid And Assist Federal Officers

The history and purposes of the statute confirm that the federal officer removal statute is properly limited to private parties assisting federal officers in performing official functions, and demonstrate why removal is not available to private regulated parties solely because of their compliance with federal law. *See, e.g., Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (statutory interpretation must take account of "'the objects and policy of the law'") (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)). This Court has frequently looked to the history and purposes of the statute when ascertaining its scope. *See, e.g., Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981); *Willingham*, 395 U.S. at 405-06; *Gay v. Ruff*, 292 U.S. 25, 32-33 (1934); *Colorado v. Symes*, 286 U.S. 510, 517-19 (1932).

1. The primary purpose of the federal officer removal statute, this Court has held, "is not hard to discern." *Willingham*, 395 U.S. at 406. The statute rests on the premise that "the Federal Government 'can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, . . . the operations of the general government may at any time be arrested at the will of one of

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[5] Indeed, that is precisely the approach this Court took in construing the federal civil rights removal statute in *Peacock*, even though the version of the removal statute at issue there lacked *any* textual limitation — that is, "federal officer," "acting under," or "other person" — on the universe of parties that could remove. *See Peacock*, 384 U.S. at 814-15 (holding that current version of the statute must be read in light of the statutory "history" of the removal statute).

its members.'" *Id.* (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1880)).[6] The purpose of the statute, in other words, is to provide a federal judicial forum for federal officers, as well as those aiding or assisting them, for acts undertaken in enforcing federal law and in that way "to safeguard the exercise of legitimate federal authority." *Manypenny*, 451 U.S. at 241 n.16.

That purpose reflects Congress's concern that state judicial proceedings might be used, in periods of national stress, to hinder federal officers in their enforcement of unpopular federal laws. *See id.* at 241-42 ("The act of removal permits a trial upon the merits of the state-law question free from local interests or prejudice."); *Ruff*, 292 U.S. at 32 (Force Act removal provision was designed to quell South Carolina's threat of nullification by "protect[ing] those engaged in the enforcement of the federal revenue law from attack by means of prosecutions and suits in a state court for violation of state law"). In that way, the federal officer removal statute reflects the "interest in protecting federal officials from possible local prejudice." *Clinton v. Jones*, 520 U.S. 681, 691 (1997).

That purpose has no application to a private regulated commercial actor. First, *Tennessee v. Davis* points to a very practical concern that those exercising federal authority will be haled into state courts in retaliation for the enforcement of unpopular laws and that, "during the pendency of the prosecution," "the officer [will be] withdrawn from the discharge of his duty." 100 U.S. at 263. Because a private regulated party sued for conduct undertaken while acting in compliance with federal regulation is not exercising or assisting in the exercise of the authority of the federal government, a suit against that party

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[6] *See also Willingham*, 395 U.S. at 406 (removal statute rests on "very basic interest in the enforcement of federal law through federal officials"); *Symes*, 286 U.S. at 517 (prior statutes were enacted to "safeguard[] officers and others acting under federal authority against peril of punishment for violation of state law . . . by reason of opposing policy on the part of those exerting or controlling state power").

will not similarly impair federal law enforcement. *Cf. Findley*, 9 F. Cas. at 68 ("prompt and effective collection of the revenue" could be "seriously impeded" when "local sentiment, adverse to a particular revenue law, . . . exert[ed] itself in irremovable prosecutions in the local courts against persons executing that [revenue] law").

Second, a party that is the *object* of regulatory enforcement efforts will not face hostility directed against those who *enforce* federal law. Put in historical terms, shippers transporting goods in compliance with the embargo during the War of 1812 did not face harassment by New England States opposed to the embargo; that animosity was reserved for persons *enforcing* the embargo. Accordingly, Congress provided a statutory right to a federal forum, free from regional prejudices, for federal customs officers and those aiding and assisting them. *See Willingham*, 395 U.S. at 405; *see also* Wiecek, 13 Am. J. Legal Hist. at 337. Affording a right of removal to private regulated parties, as does the Eighth Circuit's test, turns the historical rationale on its head by providing a basis for removal to a class of defendants that is the *object* of federal enforcement efforts.

2. In addition to safeguarding those who enforce federal law, "one of the most important reasons for [federal officer] removal is to have the validity of the defense of official immunity tried in a federal court." *Willingham*, 395 U.S. at 407; *see also International Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 86-87 (1991) (federal officers need protection of a federal forum "because of the manipulable complexities involved in determining [federal officers'] immunity"); *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841-42 (1989) (per curiam) (citing § 1442(a) as an instance in which "Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities"); *Acker*, 527 U.S. at 447 (Scalia, J., concurring in part and dissenting in part) ("the main point" of federal officer removal statute "is to

give officers a federal forum in which to litigate the merits of immunity defenses").

That purpose, too, weighs against including private commercial actors within the ambit of the "acting under" clause. Because Philip Morris is a private entity doing nothing more than complying with federal regulation, it has not asserted — and could not assert — an official immunity defense. This Court has said that "qualified immunity . . . acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Wyatt v. Cole*, 504 U.S. 158, 168 (1992). Private actors — who "hold no office requiring them to exercise discretion" and are not "principally concerned with enhancing the public good" — are not entitled to the defense of qualified immunity. *Id.*; *see also Richardson v. McKnight*, 521 U.S. 399, 404-10 (1997) (privately employed prison guards of for-profit corporation running state correctional center were not entitled to qualified immunity because "[h]istory does not reveal a 'firmly rooted' tradition of immunity" for prison guards and immunity would not serve the purposes of the doctrine) (emphasis omitted). Because a private regulated commercial actor cannot satisfy the requisites of qualified immunity, it makes no sense in light of the statutory purposes to provide such an actor with a right to federal officer removal.

C. This Court's Decisions Establish That The "Acting Under" Clause Protects Only Those Assisting In Performing Official Functions

1. In *Davis v. South Carolina*, 107 U.S. 597 (1883), this Court held that a U.S. army corporal was "acting under" a United States Deputy Marshal in the arrest of a distiller for violating the revenue laws. *See id.* at 597-98. The distiller was killed as he sought to escape, and Corporal Davis was indicted for murder in a South Carolina state court. Davis removed the case to federal court under § 643 of the Revised Statutes, which afforded a right of removal to "any officer appointed under or acting by au-

thority of any revenue law . . . or any person acting under or by authority of such officer."

This Court first rejected South Carolina's argument that the statute did not "extend[] to embrace the case of United States marshals" because a marshal is not "appointed under or acting by authority of any revenue law." *Id.* at 599-600. The marshal, "when engaged officially in lawful attempts to enforce a revenue law, by the arrest of persons accused of offenses against it, . . . is an officer acting under the authority of that law; for it is that law under which is issued the process, which constitutes his authority for his official action." *Id.* at 600.

With respect to Davis, who was neither a revenue officer nor a marshal, the Court explained that "the protection which the [removal statute] . . . furnishes to the marshal and his deputy[] also shields all who *lawfully assist him in the performance of his official duty*." *Id.* (emphasis added). Under that standard, the Court held that Davis, because he was "detailed as a guard in aid of the marshal," was entitled to remove the case to federal court. *Id.*

Davis v. South Carolina points to two propositions that bear decisively on this case. First, the "acting under" clause — far from entitling a wide range of *private* parties to invoke the federal officer removal statute — was intended originally to benefit primarily federal officials other than customs or revenue officers who were nonetheless involved in the enforcement of the revenue laws. *See, e.g.*, *Black's Dillon on Removal of Causes* § 43, at 58 (1898) ("United States marshals are not officers appointed under the revenue laws," and therefore "[i]t is only when they are acting in their official character, in the enforcement of the revenue laws or the election laws, that suits or prosecutions against them come within the terms" of the removal statute). Second, to the extent that the "acting under" clause extends to parties other than revenue and customs officers, those parties must be "assist[ing]" in the "performance of [an] official duty." 107 U.S. at 600.

2. This Court confronted whether a private party could invoke the federal revenue officer removal statute in *Maryland v. Soper*, 270 U.S. 9 (1926). There, four prohibition agents and an employee — their chauffeur — were indicted for murder in state court. *See id.* at 21-22. The defendants removed under the federal revenue officer removal statute, then § 33 of the Judicial Code. The defendants argued that they were acting in "discharge of their official duties as prohibition agents, and as officers of the internal revenue in the discharge of their duty." *Id.* at 22. The chauffeur, who was not a federal officer, maintained that he "was assisting [the officers] and was acting under the authority of the prohibition director." *Id.*; *see also id.* (characterizing the chauffeur as a "helper").

This Court held that removal was improper.[7] Before reaching that conclusion, however, the Court observed that the chauffeur, as a "helper to the four officers under their orders and by direction of the prohibition director for the state," "has the same right to the benefit of [the federal revenue officer removal statute] as [the prohibition officers]." *Id.* at 30; *see also Manypenny*, 451 U.S. at 253 n.5 (Brennan, J. dissenting) (noting the chauffeur in *Soper* "was assisting the four agents under the authority of the Prohibition Director"). That was consistent with this Court's understanding of the removal provision's purpose: Congress "assumed that the enforcement of the National Prohibition Act was likely to encounter in some quarters a lack of sympathy and even obstruction, and sought by making section 33 applicable to defeat the use of local courts to embarrass those who must execute it." *Soper*, 270 U.S. at 32.

Soper is in keeping with the Court's holding in *Davis v. South Carolina* that the "acting under" clause extends to those assisting federal officers in performing official func-

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[7] The Court concluded that the defendants had not "establish[ed] fully and fairly" their immunity defense and therefore had not justified "so exceptional a procedure" as removal. 270 U.S. at 34-35.

tions. Because Congress enacted § 1442(a)(1) against that settled judicial understanding, that interpretation of the "acting under" clause should control here. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When . . . judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well."); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (same).

3. The foregoing federal officer removal cases culminated most recently in this Court's decision in *City of Greenwood v. Peacock*, which establishes that the "acting under" clause extends *only* to those private actors affirmatively assisting federal officers in carrying out official government functions. *See* 384 U.S. at 815-16.

Peacock involved the prosecution on various state criminal charges of persons engaged in civil rights activity in Mississippi. *See id.* at 810. The defendants removed to federal court under the civil rights removal statute, which in relevant part allows removal of a civil action or criminal prosecution for "any act under color of authority derived from any law providing for equal rights." 28 U.S.C. § 1443(2). This Court rejected the defendants' claim to removal, holding that § 1443(2) "is available only to federal officers and to persons assisting such officers in the performance of their official duties." 384 U.S. at 815.

In reaching that conclusion, this Court relied on the history of the civil rights *and* federal officer removal statutes. The Court noted that the "progenitor of § 1443(2) was § 3 of the Civil Rights Act of 1866," which allowed removal of state-court actions against "any officer . . . or other person" for conduct in furtherance of the Act. *Id.* The Court explained that the "other person" clause in the 1866 statute was limited to those private persons assisting in enforcing federal law, a limitation that Congress intended to carry forward in § 1443(2).

Limiting § 1443(2) to "official enforcement activity under federal equal civil rights laws," the Court stated,

"draws support from the analogous provisions in the removal statutes available to federal revenue officers." *Id.* at 820 n.17. Prior to 1866, federal officer removal statutes — that is, the Customs Act of 1815 and the Force Act of 1833 — "characteristically used the 'officer . . . or other person' formula in defining those entitled to the benefit of removal." *Id.* (ellipsis in original). The Customs Act, the Court said, "described the 'other person' as one 'aiding or assisting' the revenue officer." *Id.* Although the Revenue Act of 1866 "characterized the 'other person' as one 'acting under or by authority of any [revenue] officer,'" that description "obviously drew on the comparable characterization of the 'other person' in the Customs Act of 1815." *Id.* at 823 n.20 (alteration in original).

In short, this Court held that the civil rights removal statute contained an implicit "acting under" limitation, *see id.* at 823-24, which mirrored the "acting under" clause of the federal officer removal statute, *see id.* at 823 n.20. Based on those principles, the Court concluded that § 1443(2) authorized removal by private parties only if they were "authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law." *Id.* at 824.

D. A Private Party Complying With Federal Regulatory Requirements Is Not Thereby "Assisting" A Federal Officer In Enforcing Federal Law

As we have shown, the "acting under" clause is properly limited to those aiding or assisting a federal officer in performing an official function. That standard provides no basis for removal by a private commercial actor by reason of its compliance with federal law, no matter how comprehensive or detailed the federal regulation.

First, a private commercial actor conforms its conduct to federal regulation by acting in the marketplace in adherence to federal law, but that does not mean its conduct is undertaken on behalf of the federal government. *Cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972)

("'pervasive' . . . regulation of private clubs" does not "make the State in any realistic sense a partner or even a joint venturer in the club's enterprise"); *Sullivan*, 526 U.S. at 52 ("Action taken by private entities with the mere approval or acquiescence of the State is not state action."). Although compliance with federal regulation may be said, broadly speaking, to advance the public interest and promote the goals of the regulating officials, regulatory compliance does not make a private actor one who assists a federal officer within the meaning of the statute. That concept of assistance is manifestly inconsistent with the historical rationales for removal, because it would afford a right of removal to those who are the *objects* of, rather than those who *participate and assist* in, law enforcement. *See supra* pp. 17-18; *see also Ruff*, 292 U.S. at 39 (railroad receiver, although "an officer of the court operating the railroad pursuant to the order appointing him," was not entitled to removal because he was not "an officer engaged in enforcing an order of a court").

Second, the importance of the distinction between compliance and assistance follows from this Court's § 1983 and state-actor cases. In *Polk County v. Dodson*, this Court held that a public defender, although an employee of the State, was not acting under color of law in representing an indigent defendant in a state criminal proceeding. *See* 454 U.S. at 317-18. The Court found that the "assignment [as a public defender] entailed functions and obligations in no way dependent on state authority." *Id.* at 318. Moreover, there was no basis for attributing the conduct of the public defender to the State: "[i]n our system a defense lawyer characteristically opposes the designated representatives of the State" and "best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" *Id.* at 318-19. Given the "adversarial functions" of a public defender vis-à-vis the State, this Court found it "peculiarly difficult to detect any color of state law" in the conduct of the public defender. *Id.* at 320. In

Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001), this Court construed *Dodson* as reflecting the common-sense principle that "[t]he state-action doctrine does not convert opponents into virtual agents." *Id.* at 303-04.

That principle applies equally here. A business enterprise's primary — if not exclusive — interest is to "operate[] its business in furtherance of its own goals," not the public good. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 403 (1978); *cf.* Adam Smith, *The Wealth of Nations* 23-24 (Edward Cannan ed., Bantam Classics 2003) (1776) ("It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."). When those private ends threaten the public good, regulation is often used to temper the conflict. The interests of a private commercial actor and a regulating agency are therefore characteristically, if not inevitably, antagonistic. Just as in *Dodson* — where the public defender was an employee of the State — it would make no sense to view a private regulated commercial actor as acting on behalf of or aiding or assisting a regulatory agency in the performance of its regulatory duties.

Third, decisions of lower federal courts prior to Congress's adoption of the current version of the statute in 1948 show that private regulated parties have no claim to removal. *Johnson v. Wells, Fargo & Co.*, 98 F. 3 (C.C.N.D. Cal. 1899) (No. 12739), for example, involved "the alleged neglect of [Wells Fargo], as a common carrier, to receive and transport a certain package of photographs offered and tendered by plaintiff for conveyance and transportation." *Id.* at 4. Wells Fargo removed to federal court under § 643 of the Revised Statutes. Like Philip Morris here, Wells Fargo argued that, in refusing conveyance of the plaintiff's package, it was complying with a statute requiring all persons wishing to ship goods to have a revenue stamp. *Id.* at 5-6. Wells Fargo claimed to be "a person acting under the authority of a revenue law" because

the "suit [was] prosecuted . . . on account of the right and authority claimed by it under such law to require the plaintiff to furnish or pay" for the stamp. *Id.* at 7.

The court rejected that theory, explaining that "[t]he purpose of the statute [was] to protect the revenue officers of the government in the line of their official duties, and those who are employed to act under them in the performance of such duties." *Id.* at 8. The court held that, "further than providing this necessary protection to the administration of its revenues, the federal government has no interest in the business affairs of the people incidentally brought within the range of the tariff system." *Id.*[8]

That decision shows that the "acting under" clause has historically been available to private actors only insofar as they assist in the performance of official functions and that private commercial actors do not satisfy that standard. Congress's enactment of the current version of the statute against that background suggests that it had no intent to disturb that settled judicial understanding. *See National Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004) (courts should "assume Congress legislated against [a] background of law, scholarship, and history when it enact[s]" a statute).

Fourth, there is no small irony in Philip Morris's position. The acts that it claims to have committed under federal regulatory compulsion are the very same acts that the United States alleges constituted a RICO conspiracy. In fact, the federal government has charged that Philip

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[8] *See also In re Shumpka*, 268 F. 686 (N.D.N.Y. 1920), which held that a defendant, indicted for violation of state liquor laws, was not acting under the Prohibition Commissioner in selling his products with a permit from the Commissioner. The statute's limited purpose, the court stated, was to permit removal "from state courts to the federal courts [of] civil actions or criminal prosecutions against [federal] officers in the performance of their official duties, and against persons assisting the officers in the performance of official acts under the revenue laws." *Id.* at 687.

Morris, and other conspirators, "did the exact opposite of what the Government and public health community called for" and "fraudulently exploited the FTC test method to target and benefit financially by deceiving smokers." Post-Trial Br. of the United States at 70-71, *United States v. Philip Morris USA Inc.*, No. 99-CV-02496 (D.D.C. filed Aug. 24, 2005); *see also* Respondent's Br. in Response to Br. for the United States as Amicus Curiae at 1 (U.S. filed Dec. 19, 2006) (noting "[t]he Department of Justice is currently involved in litigation against respondent, in which one of the central issues is the FTC's regulatory history with respect to low yield cigarettes"). That suit brings into sharp focus the importance of the distinction between parties that are objects of regulatory compliance and those that assist in enforcing regulatory compliance. It also underscores the incongruity of using the "acting under" clause to "convert opponents into virtual agents." *Brentwood*, 531 U.S. at 303-04.

Fifth, if compliance with federal regulation is sufficient to allow a private party to invoke the federal officer removal statute, then § 1442(a)(1) will become a vehicle for scores of regulated parties with plausible preemption defenses against state-law claims to remove to federal court. *See infra* Part II.D. There is no basis for inferring from Congress's decision to carry forward the "acting under" clause in successive versions of the statute that it intended to redefine so radically the balance of state and federal judicial authority. On the contrary, the natural inference is that Congress intended to preserve the clause's limited role in permitting removal only by federal officers or those assisting them in carrying out their official duties.[9]

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[9] *See, e.g.*, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (it is an "ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute") (internal quotation marks omitted); *United States v. Bass*, 404 U.S. 336, 349-50 (1971)

II. THE EIGHTH CIRCUIT'S COMPREHENSIVE-AND-DETAILED-CONTROL TEST DOES NOT COMPORT WITH THE STATUTORY TEXT OR PURPOSES

The rationales given by the Eighth Circuit for its interpretation of the "acting under" clause are unavailing.

A. The Eighth Circuit Erred In Construing The Statutory Text

1. The Eighth Circuit gave short shrift to the text of § 1442(a)(1). Instead, the court announced — with no consideration of the historical function of the "acting under" clause — that "[w]hether a defendant is 'acting under' the direction of a federal officer depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." Pet. App. 6a.

That interpretation has no basis in the text or structure of the statute. Indeed, the only cases the Eighth Circuit cited on this point involve government contractors, *see infra* Part II.C, and the courts there did not meaningfully address the statutory text. As shown above, nothing in the text of the federal officer removal statute supports the proposition that whether a private party is "acting under" a federal officer depends on the comprehensiveness and detail of federal regulation. The proper inquiry is whether a private party is assisting a federal officer in carrying out an official function. *See, e.g.*, *Peacock*, 384 U.S. at 820 n.17, 823 n.20; *Soper*, 270 U.S. at 22, 30; *Davis v. South Carolina*, 107 U.S. at 600.

2. As a "pure jurisdictional statute," *Mesa v. California*, 489 U.S. 121, 136 (1989), § 1442(a)(1) should be

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("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"; "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision").

strictly construed, a corollary of the principle that federal courts are courts of limited jurisdiction. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). The Eighth Circuit, however, read this Court's decision in *Willingham* as requiring it to interpret the statute "broad[ly]" in deciding whether Philip Morris was "acting under" a federal officer. Pet. App. 4a-5a.

That reading of *Willingham* is substantially wide of the mark. In *Willingham*, this Court rejected the proposition that doubt as to whether a federal officer could claim official immunity rendered removal improper, explaining that, "[a]t the very least," the statute "is broad enough to cover all cases where *federal officers* can raise a *colorable defense* arising out of *their duty to enforce federal law*." 395 U.S. at 406-07 (emphases added). Properly construed, the upshot of *Willingham* is that courts should apply the federal officer removal statute generously in determining whether a federal officer has a colorable "defense of official immunity." *Id.* at 407. It does not follow from that proposition that the statute must be construed broadly in all respects. *Cf. Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (reciting "canon of unquestionable vitality . . . 'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used'") (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)). Indeed, after *Willingham*, this Court made clear that § 1442(a)(1) should be broadly interpreted only "[i]n construing the colorable federal defense requirement." *Acker*, 527 U.S. at 431.

Other decisions of this Court support a strict construction of § 1442(a)(1). In *International Primate Protection League*, for example, the Court read the statute narrowly, rejecting the defendant agency's broad interpretation of "officer of the United States." 500 U.S. at 81-82.[10] Simi-

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[10] The Eighth Circuit mistakenly believed that Congress's subsequent amendment of § 1442(a)(1) to include federal agencies provided "further support for a broad interpretation of the federal officer removal statute." Pet. App. 6a. That Congress permitted federal agen-

larly, in *Mesa v. California*, a case that involved U.S. Postal Service employees, this Court held that federal officer removal requires the "averment of a federal defense," reasoning that "the present language of § 1442(a) cannot be broadened by fair construction to give it the meaning which the Government seeks." 489 U.S. at 132-35, 139. It would be peculiar to afford a broad interpretation to the "acting under" clause for the benefit of private commercial actors when this Court has declined to construe the statute broadly in cases involving actual federal officers and agencies.

International Primate Protection League and *Mesa* properly reflect the longstanding principle that, because the States are entitled "to make and enforce their own laws," a court may exercise federal officer removal jurisdiction only when Congress has made clear that it intended to "wrest[]" from the state courts "jurisdiction to try persons accused of violating [state] laws." *Symes*, 286 U.S. at 518 (emphasis added); *see also Screws*, 325 U.S. at 111-12 (plurality) (requirements for federal officer removal are "strict" because it is an "exceptional procedure which wrests from state courts the power to try offenses against their own laws") (internal quotation marks omitted).

B. The Eighth Circuit Misapprehended The History And Purposes Of The Federal Officer Removal Statute

The Eighth Circuit's understanding of the history of the federal officer removal statute is flawed. The court of appeals did recite this Court's account of the purposes of the statute, *see* Pet. App. 5a, but it made no effort to tie that analysis to its broad interpretation of the "acting under" clause. For the reasons set forth in Part I.B, *supra*, a construction of § 1442(a)(1) that provides a right of removal

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cies, like federal officers, to invoke the federal officer removal statute says nothing about whether the statute should be interpreted broadly in determining whether private regulated parties are "acting under" a federal agency or officer.

to a private regulated commercial actor cannot be reconciled with historical rationales for federal officer removal.

The Eighth Circuit nonetheless apparently believed that removal by Philip Morris here was consistent with the rationale of *Tennessee v. Davis* because, in its view, plaintiffs' state-law claims "directly implicate[] the enforcement and wisdom of the FTC's tobacco policies." Pet. App. 15a. That view, however, ascribes a historically unwarranted purpose to the removal statute and fundamentally confuses removal with preemption.

The defense of preemption, grounded in the Supremacy Clause, ensures that state law does not unduly threaten compliance by regulated parties with federal directives. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (reconciling, under preemption principles, various state-law claims with federal regulation of cigarettes). Imposing state-law liability on regulated entities is preempted when "it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) (internal quotation marks and citation omitted); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 875-84 (2000).

A private regulated commercial actor's colorable preemption defense, however, has never warranted removal under the federal officer removal statute. In fact, this Court's precedent is clear that "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). Moreover, this Court has emphasized that, "when a state proceeding presents a . . . pre-emption issue, the proper course is to seek resolution of that issue by the state court," because state courts are "presumed compe-

tent to resolve federal issues." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988).

For those reasons, Philip Morris's (allegedly) colorable preemption defense does not bring this case anywhere close to the historical justifications for federal officer removal. Under longstanding precedent, such a defense is properly heard in state court subject to this Court's discretionary review under 28 U.S.C. § 1257.

C. The Eighth Circuit's Assumption That Private Regulated Parties Have The Same Status As Government Contractors Is Unwarranted

In construing the "acting under" clause, the Eighth Circuit relied exclusively on case law involving government contractors' efforts to remove under § 1442(a)(1). *See* Pet. App. 6a-9a (citing and discussing *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 390 (5th Cir. 1998), and *Fung v. Abex Corp.*, 816 F. Supp. 569, 570-73 (N.D. Cal. 1992)). Those decisions, however, do not meaningfully address the text, history, or purposes of the removal statute. Nor do they, in any event, support removal by a private actor subject to federal regulation.

Some federal courts have held that — unlike private regulated parties, *see Wells Fargo*, 98 F. at 5-6 — government contractors, in certain circumstances, may avail themselves of the federal officer removal statute. *See, e.g., Ward v. Congress Constr. Co.*, 99 F. 598, 599, 604 (7th Cir. 1900) (removal under § 643 of Revised Statutes by a company "acting by the employment and under the authority of the treasury department"); *Bryant Bros. Co. v. Robinson*, 149 F. 321, 324-25 (5th Cir. 1906) (citing and explaining *Ward*); *Gulati v. Zuckerman*, 723 F. Supp. 353, 358-59 (E.D. Pa. 1989) (government contractor that was entitled to official immunity defense could remove under § 1442(a)(1)).

Those decisions rest on the view that a government contractor may be deemed an *employee* of the federal government when federal control and oversight of the con-

tractor is substantial and the tasks being performed are those that the government might otherwise perform itself. *See, e.g., Paldrmic v. Altria Corporate Servs., Inc.*, 327 F. Supp. 2d 959, 968 (E.D. Wis. 2004) (in government contractor cases, "[t]he actions for which the defendants were sued were required by the federal government, and the level of federal control of their conduct was such that they were de facto government employees"); *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832 (N.D. W. Va. 2004) ("[C]ourts have applied the federal officer removal statute to private actors whose official functions are so intertwined with the federal government that they are effectively considered employees of the federal government."); *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (removal by government contractor is appropriate when contractor is so "intimately involved with government functions as to occupy essentially the position of an employee"). *See generally West v. Atkins*, 487 U.S. 42, 43, 51-52 (1988) (physician "under contract with the State to provide medical services to inmates at a state-prison hospital" was acting under color of state law).

If a private party contracting to perform governmental functions can be fairly thought of as an employee in performing that official function, then affording that party a right of removal may well accord with the text, history, and purposes of § 1442(a)(1). *See, e.g.*, H.R. Rep. No. 80-308, at A134 (1947) (explaining that the statute was "extended to apply to all officers and *employees* of the United States or any agency thereof") (emphasis added). Whatever the proper rule in those cases, however, comprehensiveness and detail of federal control are improper criteria for assessing whether a private regulated commercial actor sued for acts undertaken in compliance with federal law may remove under § 1442(a)(1). *See supra* Part I.D. The Eighth Circuit's reliance on government contractor cases is thus in error.

D. The Eighth Circuit's Test Would Substantially Expand Federal Jurisdiction

The Eighth Circuit's interpretation of the "acting under" clause would radically expand the jurisdictional compass of § 1442(a)(1). That addition to the jurisdiction of the federal courts would threaten legitimate interests of the States and would unnecessarily tax the resources of the federal judiciary.

1. Although the Eighth Circuit characterized the regulatory regime governing light cigarettes as entailing "an unusually high level of governmental participation and control," Pet. App. 13a, a comparison with other regulatory regimes that this Court recently has considered demonstrates that many regulated parties would comfortably satisfy the Eighth Circuit's test.

The federal government often imposes comprehensive safety regulations on entities engaged in dangerous activities. For instance, the federal government has long subjected the coal-mining industry to comprehensive, detailed regulation through the Federal Mine Safety and Health Act of 1977 ("FMSHA"), requiring mine operators to employ specific safety standards, to keep mine health and safety records, to provide employee safety training, and to submit to and assist in unannounced inspections of their mines. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 202-04 (1994); *see also Davis v. Eagle Coal & Dock Co.*, No. 33054, 2006 WL 3543017, at *1-*4 (W. Va. Dec. 4, 2006) (holding that, although the FMSHA and its "accompanying regulations . . . are detailed and comprehensive," FMSHA did not preempt state-law tort claims). To ensure immediate compliance with mine safety regulations, the government levies steep fines and imposes severe sanctions for violations. *See Thunder Basin Coal*, 510 U.S. at 204 ("The Secretary [of Labor] has broad authority to compel immediate compliance with [FMSHA] provisions through the use of mandatory civil penalties, discretionary daily civil penalties, and other sanctions.").

Furthermore, unlike the FTC's regulation of cigarettes, many federal regulatory programs dictate the design and manufacture of potentially dangerous products in addition to prescribing labeling and testing standards. *See, e.g.*, *Geier*, 529 U.S. at 875-76 (describing detailed federal regulatory scheme that mandates minimum requirements for safety features for motor vehicles and specifies methods by which those safety features must be tested); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662-68 (1993) (describing regulations controlling maximum train speeds and setting standards for warning equipment and signage that must be installed at railroad crossings under the Federal Railroad Safety Act of 1970). Likewise, the Food and Drug Administration ("FDA") heavily regulates drugs and medical devices, requiring manufacturers to comply with detailed standards for testing, approval, and labeling of these products. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 343 (2001) (describing "thorough review process" that FDA requires medical devices to undergo before entering marketplace); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 477 (1996) (federally mandated premarket approval process for new medical devices is "rigorous"). Pesticide manufacturers are also subject to comprehensive federal regulations pertaining to registration, labeling, and packaging of pesticides. *See Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 437-39 (2005) (describing the Federal Insecticide, Fungicide, and Rodenticide Act as "a comprehensive regulatory statute") (internal quotation marks omitted).

Given the holdings in those cases that certain claims brought under those statutes are not preempted by federal statute, a holding in favor of Philip Morris would threaten to transform the companies in those regulatory contexts into federal officers capable of removing claims that would not even be subject to federal preemption. And, in light of the government's extensive regulation of a wide range of private commercial actors even when preemption is not an issue, the Eighth Circuit's test would

give any number of parties a basis to invoke the removal jurisdiction of the federal courts.

2. Affording private regulated commercial actors a right to remove state-law claims to federal court based on nothing more than their compliance with federal regulation would substantially alter the balance of jurisdiction between state and federal courts, undermining important interests of the States in at least two respects.

At the most fundamental level, a substantial increase in federal officer removal jurisdiction would undermine the sovereignty interest of the States in having their own judicial forums available to their citizens to vindicate offenses, both civil and criminal, against state law. Our system of federalism embodies the principle that state, not federal, courts should be the primary arbiters of state law.[11] That principle is especially apt here given the historic role that States have played in policing unfair and deceptive consumer and business practices. *See California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (noting the "long history of state common-law and statutory remedies against . . . unfair business practices" and that such regulation "is an area traditionally regulated by the States"); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (holding that "prevent[ion] [of] the deception of consumers" was "well within the scope of California's police powers").

This Court's "deeply felt and traditional reluctance . . . to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes" rests in part on a "'[d]ue regard for the rightful independence of state gov-

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[11] *See Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1875) ("The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 407 (1981) (Brennan, J., dissenting) ("state courts remain the preferred forum for interpretation and enforcement of state law"); *cf. Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499-500 (1941); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

ernments.'" *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379-80 (1959) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)); *see also Shamrock Oil & Gas*, 313 U.S. at 108-09. The independence and sovereignty of state courts is diminished when private regulated commercial actors (such as Philip Morris) wrest state-law actions from state court based on mere compliance with federal regulation. *See* Kenneth S. Rosenblatt, *Removal of Criminal Prosecutions of Federal Officers: Returning to the Original Intent of Congress*, 29 Santa Clara L. Rev. 21, 28 (1989) (history of federal officer removal statute "indicates that Congress used the remedy sparingly, as befits a threat to state sovereignty").

Beyond the basic sovereignty interest at stake in the proper construction of § 1442(a)(1), an increase in federal officer removals by private regulated parties would impede the enforcement of state consumer protection statutes. Owing to "crucial and probably inherent [institutional] limitations," the FTC has "strongly endorsed and emphasized the need for complementary state law enforcement work." William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 729 n.10 (1972). With the FTC's encouragement, "[a]ll fifty states and the District of Columbia have enacted at least one statute . . . aimed at preventing consumer deception and abuse in the marketplace." National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 41 (4th ed. 1997). Those state statutes "incorporat[e] the FTC Act concepts of deception and unfairness and . . . provid[e] significant state and private remedies"; they are thus "particularly important" in redressing "marketplace misconduct and abuse of consumers" because the FTC Act provides for "only FTC enforcement and not state or private enforcement." *Id.*[12]

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[12] Congress has expressly endorsed this system of dual state and federal enforcement. *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 13, 108 Stat. 1691, 1696-97 ("The [FTC] shall review its statutory responsibilities to identify those matters

Removals under § 1442(a)(1) by private regulated parties would undermine the effectiveness of these state consumer protection remedies. Litigation in federal courts is ordinarily more expensive than litigation in state court and may also be substantially slower. *See, e.g.*, Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 404 (1992) (finding that both plaintiff and defense attorneys agree that "federal court litigation is more expensive to undertake" than state court litigation). Indeed, this Court has previously recognized the substantial burdens that removal can have on state-law enforcement. *See Mesa*, 489 U.S. at 138 (noting that "[i]n . . . our Nation's large but less populous States the distance and accompanying burdens on state prosecutors" of litigation in federal court may be especially "acute"). Expanding the federal officer removal statute to include private regulated commercial actors could thus deter or otherwise hinder legitimate, and socially beneficial, state efforts to combat unfair and deceptive consumer practices.

3. Apart from skewing the federal-state jurisdictional balance, an expansive reading of the "acting-under" clause would unnecessarily burden the federal judiciary. In analogous circumstances, this Court has cautioned that the federal diversity statute should be strictly construed to "reliev[e] the federal courts of the overwhelming burden of business that intrinsically belongs to the state courts." *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941) (internal quotation marks omitted).

That principle weighs heavily against the Eighth Circuit's legal standard here. A construction of the "acting under" clause that allows removal by private regulated parties would give federal courts jurisdiction over a wide array of cases that have traditionally been litigated in

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within its jurisdiction where Federal enforcement is particularly necessary or desirable and those areas that might more effectively be enforced at the State or local level.").

state court. Such an allocation of jurisdiction, especially one effected by judicial interpretation, would unnecessarily burden the federal judiciary, with substantial consequences for the efficient operation of federal courts. *See* William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1, 4, 7-9 (1993) (overburdening the federal courts will result in a "decline in the high quality of justice the nation has long expected of the federal courts," and a key to avoiding that result is to limit "inefficient allocations of jurisdiction"); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 Emory L.J. 1147, 1147 (1994) ("Unrestrained growth in . . . jurisdiction is undermining the effective functioning of the federal judiciary.").

III. THE FTC'S "REGULATION" OF LIGHT CIGARETTES IS INSUFFICIENT TO TRANSFORM PHILIP MORRIS INTO A PERSON "ACTING UNDER" A FEDERAL OFFICER

Even under the Eighth Circuit's test, or any standard that attaches significant weight to the comprehensiveness and detail of federal regulation, Philip Morris is not a person "acting under" a federal officer in marketing and selling light cigarettes.

A. The 1970 Voluntary Agreement Does Not Establish That Philip Morris Is Entitled To Federal Officer Removal

The Eighth Circuit concluded that the 1970 voluntary agreement of major tobacco companies, including Philip Morris, to disclose tar and nicotine levels in advertising constituted comprehensive and detailed regulation of Philip Morris sufficient to warrant federal officer removal. *See* Pet. App. 10a-12a. That analysis is seriously flawed.

First, the FTC has broad authority to prescribe regulations "defin[ing] with specificity acts or practices which are unfair or deceptive," 15 U.S.C. § 57a(a)(1)(B), and it has issued hundreds of pages of such regulations, *see* 16 C.F.R. Pts. 17-901. Not a *single* one of those pages con-

cerns cigarettes. *See id.* Pt. 408 ("Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking") (intentionally left blank). The FTC has never attempted to regulate the design or manufacture of cigarettes. Nor has the FTC ever promulgated any regulations requiring cigarette makers to test the tar and nicotine levels of their cigarettes, defining how such tests must be conducted, dictating how those results must be disclosed, or describing how the test results should be used in cigarette advertising.

Second, the FTC was not a party to the 1970 voluntary agreement, and it lacks the legal authority to enforce it. The FTC never *required* the adoption of the Cambridge Filter Method, as the D.C. Circuit's decision in *Brown & Williamson* confirms. That court ordered a modification of a district court injunction regulating Brown and Williamson's marketing of light cigarettes. *See* 778 F.2d at 44-45. The injunction "place[d] the burden on B & W to justify the advertisement of results from a different system of testing which it considers superior to the FTC system, even if B & W includes a prominent disclaimer explaining that the rating comes from a new system comparable to that used by the FTC and other manufacturers." *Id.* at 44. The court held that provision to be unlawful, reasoning that, "[b]ecause the FTC has not adopted its system of testing pursuant to a *Trade Regulation Rule* under section 18 of the FTC Act, one cannot say that the FTC system constitutes the *only* acceptable one available for measuring milligrams of tar per cigarette." *Id.* (emphases added, citation omitted).

Third, the absence of extensive regulation of light cigarettes, notwithstanding the voluntary agreement, is made obvious by the FTC's proposed revisions in 1997 to its cigarette testing methodology. In a notice inaugurating that rulemaking, the FTC sought comment on whether to define light cigarette descriptors and observed that there are no "official definitions" for descriptors such as "low tar" and "light." Notice, *Cigarette Testing: Request for*

Public Comment, 62 Fed. Reg. 48,158, 48,163 (1997); *see also* Amended Final Opinion at 1631 n.52, *United States v. Philip Morris USA, Inc.*, Civ. A. No. 99-2496 (GK) (D.D.C. Aug. 17, 2006) ("the FTC does not impose, regulate, or require [the use of light descriptors]"; "[h]ow those terms are applied, and on which brands, is entirely up to the tobacco companies") (internal quotation marks and alterations omitted), *at* http://www.dcd.uscourts.gov/opinions/2006/99-2496-082006a.pdf.

Even more telling is that major cigarette companies, including Philip Morris, filed joint comments with the FTC stating that "[t]he manufacturers are not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." Comments of Philip Morris Inc., *et al.*, at 94, *On the Proposal Entitled FTC Cigarette Testing Methodology*, FTC File No. P944509 (filed Feb. 5, 1998). Then, in 2002, Philip Morris urged the FTC to "adopt a rule expressly authorizing the industry to continue to use [light] descriptors." Philip Morris Petition for Rulemaking Concerning Tar and Nicotine Testing and Disclosure at 34 (FTC filed Sept. 18, 2002). The FTC's proposed regulation of light descriptors, as well as the positions of the tobacco companies, demonstrates that the Eighth Circuit is simply wrong in its belief that the FTC has comprehensively regulated light cigarettes.

Fourth, there is nothing exceptional about the detail of the Cambridge Filter Method. The Eighth Circuit deemed it important that the FTC specified the parameters for testing tar and nicotine in cigarettes. *See* Pet. App. 8a (citing Notice, *Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11,178 (1967)). But, given that the purpose of the Cambridge Filter Method is to standardize testing, and thereby to provide an objective basis for comparison of different brands, *see Brown & Williamson*, 778 F.2d at 37, it is far from extraordinary that the FTC specified some conditions for testing, such as butt length and

sample size. It would have been surprising had the FTC not made those specifications.

In short, the 1970 voluntary agreement does not make Philip Morris a party "acting under" a federal officer, even under a control test. The FTC has never mandated use of the Cambridge Filter Method, has never defined the descriptors "light" and "low tar," and has never requested or required the marketing of light cigarettes.[13] There is simply no basis for concluding that Philip Morris, in its marketing of light cigarettes, was "acting under" a federal officer for purposes of § 1442(a)(1).

B. The FTC's Cessation Of Cigarette Testing Does Not Entitle Philip Morris To Federal Officer Removal

The Eighth Circuit considered it significant that "the FTC itself conducted the entire testing process [of light cigarettes] for twenty years" and then "require[d] the cigarette manufacturers to conduct the testing to its specifications." Pet. App. 9a. But the FTC has never *required* any tobacco company to test its cigarettes. The testing that the Eighth Circuit found significant was the product of the 1970 voluntary industry agreement. *See* 62 Fed. Reg. at 48,158 & n.5.

Furthermore, there is nothing exceptional about product testing requirements in the context of federal regulation. Government testing is a familiar aspect of many regulatory regimes. *See, e.g.*, Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82

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[13] *See, e.g., United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) ("The specific advertisements which the Government claims were intentionally misleading . . . were certainly not mandated by the FTC."); *see also Paldrmic*, 327 F. Supp. 2d at 966-67 (design and manufacture of Marlboro Lights were "acts that most assuredly were not performed under the direct and detailed control of the FTC"); *Virden*, 304 F. Supp. 2d at 846 ("[T]he FTC did not mandate the use of [the Cambridge Filter Method], did not direct [Philip Morris] to 'trick' the testing procedure, and did not require [Philip Morris] to disseminate misleading information.").

Cornell L. Rev. 773, 789 (1997) ("[p]ublic testing programs" are "often created as part of a regulatory program"). The National Highway Traffic Safety Administration, for example, conducts its own program of crash and rollover testing of automobiles, gives vehicles ratings based on that testing, and prescribes standards governing use of those ratings in advertising. *See* http://www.SaferCar.gov. In addition, the Environmental Protection Agency ("EPA") both requires fuel economy testing by automobile manufacturers themselves and conducts its own fuel economy tests at its National Vehicle and Fuel Emissions Laboratory. *See* http://www.epa.gov/fueleconomy/data.htm.

Nor is it unusual for product testing responsibilities to be imposed upon private actors. Such testing requirements are imposed under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and the Toxic Substances Control Act ("TSCA"). *See* John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 Colum. L. Rev. 261, 263 (1991) (observing that "provisions of the [FIFRA] and the [TSCA] . . . authorize EPA to require the chemical and pesticide industries to undertake toxicological and other testing of their products") (footnotes omitted); *see also* 7 U.S.C. § 136a (requiring disclosure of testing data in pesticide registration); 15 U.S.C. § 2601(b)(1) (stating congressional policy that testing for chemical substances "should be the responsibility of those who manufacture and those who process such chemical substances").

Moreover, the EPA has prescribed detailed testing procedures relating to emission standards for all varieties of engines. *See, e.g.*, 40 C.F.R. Pt. 86, Subpt. N (heavy-duty highway engines); *id.* Pt. 92, Subpt. B (locomotives); *id.* Pt. 1065 (recreational vehicles). In addition, the Department of Energy requires manufacturers of refrigerators, freezers, dishwashers, water heaters, clothes washers and dryers, air conditioners, television sets, home heating equipment, kitchen ranges and ovens, fluorescent light

tubes, showerheads, and toilets to use prescribed test methods to measure the energy and water use efficiency of their products. *See* 10 C.F.R. § 430.23; *see also id.* Pt. 430, Subpt. B, Apps. A1-Z (detailing the specific testing procedures for measuring energy and water consumption of products, ranging from furnaces to showerheads).

For those reasons, nothing about either the FTC's testing of cigarettes or its decision to cease testing demonstrates that Philip Morris faced uniquely comprehensive or detailed federal regulation in its marketing and sale of light cigarettes.

C. The FTC's Consent Orders With Other Tobacco Companies Do Not Show That Philip Morris Is Heavily Regulated

The Eighth Circuit treated consent orders entered into by the FTC and *other* parties as pillars of the purportedly comprehensive *industry-wide* regime governing light cigarettes, and concluded that petitioners' claims "directly implicate[d] the enforcement and wisdom of the FTC's tobacco policies" embodied in those consent orders. Pet. App. 15a. That conclusion is mistaken because an FTC consent order, though enforceable against the parties to the order, has no binding legal effect on non-parties.

1. Congress has made clear that the binding effect of FTC consent orders is limited to those who are party to the decrees. Before 1994, the FTC Act provided that, "[i]f the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty . . . against any [party] which engages in such act or practice." 15 U.S.C. § 45(m)(1)(B) (1988). In 1994, Congress amended that provision to codify, with respect to civil penalties, the FTC's longstanding practice of not according precedential effect to consent orders. The provision now states: "[i]f the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order*, with

respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty . . . against any [party] which engages in such act or practice." 15 U.S.C. § 45(m)(1)(B) (emphasis added). Through that provision, Congress instructed that FTC consent orders are a unique category of agency orders that should not be treated as establishing industry-wide standards.

The legislative history of the 1994 amendment confirms that understanding. In explaining the reason for the amendment, the House Report states unequivocally that "a case settled by a consent agreement would not qualify as a precedent for a section [45(m)(1)(B)] proceeding because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding." H.R. Rep. No. 103-138, at 14 (1993). The Report contrasted consent orders, which involve no factual or legal determinations, with cease-and-desist orders, which issue "after all factual and legal issues have been fully adjudicated." *Id.* In addition, the Report stated that it was "the FTC's current practice not to seek penalties based upon nonrespondent violations of outstanding consent agreements and this subsection codifies that practice." *Id.*

2. This Court has confirmed that an FTC consent order has no legal effect on those who were not parties to it. In *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961), du Pont challenged a district court's order requiring divestiture by pointing to FTC consent decrees not requiring divestiture entered in similar cases. This Court rejected the argument, reasoning that "the circumstances surrounding *such negotiated agreements* are *so different* that they cannot be persuasively cited in a litigation context." *Id.* at 330 n.12 (emphases added). The teaching of *du Pont* is straightforward: because FTC consent orders reflect a negotiated compromise, they are neither binding on nor available as a legal safe-harbor for non-parties.

3. Consistent with *du Pont*, the FTC has routinely held that consent orders are not "controlling case prece-

dent." *In re Chrysler Corp.*, 87 F.T.C. 719, 742 n.12 (ALJ decision 1975, adopted as modified by full Commission 1976); *see also, e.g., In re Telebrands Corp., et al.*, Docket No. 9313, 2004 FTC LEXIS 154, at *125 (ALJ decision, Sept. 15, 2004) (citing *du Pont* for proposition that "[t]he fact that the [FTC] has previously accepted consent orders with a performance bond . . . does not provide sufficient legal foundation to impose such a bond in this case"). That is so because "[consent] orders are negotiated by the parties" and "they are not based on any finding of violation, a necessary predicate to an adjudicated order." *In re Chrysler Corp.*, 87 F.T.C. at 742 n.12; *see also In re Trans Union Corp.*, 118 F.T.C. 821, 864 n.18 (ALJ decision 1993, affirmed as modified by full Commission 1994) (a "consent agreement [with one party] is binding only between the Commission and [that party]").[14]

The rule that FTC consent orders have no legal effect on non-parties reflects the realities of FTC enforcement actions. Consent orders, by their nature, reflect compromises between the parties and therefore do not represent the FTC's full and considered views. *See United States v.*

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[14] The FTC's position on the legal effect of its consent orders is longstanding. *See, e.g., In re Beatrice Foods Co.*, 86 F.T.C. 1, 50 (ALJ decision 1973, adopted as supplemented and modified by full Commission 1975) ("In contrast to the procedures in a divestiture order, a consent order entered into by the Commission is not an adjudication on the merits of a matter and is not binding. The Commission in such a proceeding does not determine the legality or illegality of the conduct involved, consent orders contain no complete findings of fact, and many of the factors considered are known only to the Commission and are not a part of the public record. The courts and the Commission have consistently held that a consent decree is not a binding judicial precedent because of these factors, as well as the fact that they are based entirely upon the bargaining of the parties.") (citations omitted); *In re Berger*, 56 F.T.C. 1000, 1003 n.3 (ALJ decision, adopted as modified by full Commission 1960) ("[t]he orders issued in each of these cases were based on consent agreements" and thus "they cannot be considered as legal precedents"); *In re Federal Employees' Distrib. Co.*, 56 F.T.C. 550, 574 (ALJ decision, adopted by full Commission 1959) (holding that case cited "resulted in a consent order under agreement of parties and is not a precedent in other cases for any purpose").

Armour & Co., 402 U.S. 673, 681-82 (1971). The FTC "may settle for less stringent provisions . . . because of the public interest savings in time, money, and uncertainty which the settlement will provide." Stephanie W. Kanwit, *Federal Trade Commission* § 12:4, at 12-9 (2004) (hereinafter "Kanwit-*FTC*") (internal quotation marks omitted); *see also General Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) (FTC may settle to avoid "the expense, delay and risks of litigation"); *cf. Armour*, 402 U.S. at 681-82. A private party's agreement with a consent order likewise often depends on considerations such as the "uncertainty and expense" of litigation and a desire to "preserve the confidentiality" of the matter. Kanwit-*FTC* § 12.4, at 12-9.

4. Finally, the circumstances surrounding the 1971 and 1995 consent orders strengthen the understanding that they were not intended to serve as industry-wide rules. At the time of the 1971 order, the FTC "could only recover civil penalties from a respondent which violated a cease and desist order that had been previously issued *against it*." Kanwit-*FTC* § 10:7, at 10-32 (emphasis added). In 1975, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act authorized the FTC to bring an action against any person that violated a cease-and-desist order. That change enabled the FTC to use cease-and-desist orders "to legislate prospectively and put businesses on notice of acts or practices that have been adjudged to be unfair and deceptive." *Id.* at 10-33. Thus, at the time of the 1971 consent order, even if the FTC had issued a fully adjudicated *cease-and-desist* order against American Brands, that order could not have had any legal effect on Philip Morris. It follows *a fortiori* that the 1971 *consent* order could not regulate Philip Morris's activities.

In addition, nothing in the text of the consent orders suggests that they were intended to have industry-wide application. The 1971 order made clear that American Brands' "signing of the agreement . . . is for settle-

ment purposes only and does not constitute an admission . . . that the law has been violated." JA 206. Moreover, the order was carefully limited to "American Brands, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device." JA 207. Similarly, the 1995 order stated that "the signing of said agreement is for settlement purposes only and does not constitute an admission . . . that the law has been violated." *In re American Tobacco Co.*, 119 F.T.C. 3, 9 (1995). Those provisions would have been unnecessary — indeed, inappropriate — were the FTC aiming to promulgate a *de facto* industry-wide rule.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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February 23, 2007

APPENDIX

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1442 provides:

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

28 U.S.C. § 1443 provides:

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

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IN THE

Supreme Court of the United States

LISA WATSON, ET AL.,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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QUESTION PRESENTED

The Federal Trade Commission requires that the tar and nicotine smoke yields of cigarettes be tested using a single method. The FTC performed the testing itself for 20 years, and then delegated the testing function to the major members of the tobacco industry. Respondent and others perform those tests under the supervision, direction, and control of the FTC, which reports the results to Congress and the public, requires respondent to disclose the test results in its advertising, and permits respondent to use terms such as "light" to describe the test results. The question presented is whether respondent is thereby "acting under" a federal officer or agency within the meaning of 28 U.S.C. § 1442(a)(1), such that state-law claims directly challenging the federally mandated testing and disclosure regime can be removed to federal court.

RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition to the petition for a writ of certiorari remains accurate.

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BRIEF FOR RESPONDENTS

Respondent Philip Morris USA Inc. (PMUSA) respectfully submits that the judgment of the court of appeals should be affirmed.

STATEMENT

Petitioners filed this putative class action in Arkansas state court, alleging that PMUSA's marketing of Cambridge Lights and Marlboro Lights cigarettes violated an Arkansas consumer protection law. At the heart of petitioners' complaint is a challenge to the testing system mandated by the Federal Trade Commission (FTC) for measuring and disclosing tar and nicotine smoke yields for all cigarettes. Because PMUSA engages in the challenged conduct on behalf of and at the direction of the FTC, PMUSA removed the action to federal court pursuant to 28 U.S.C. § 1442(a)(1), which authorizes removal by private persons "acting under" federal officers and agencies. The district court denied petitioners' motion to remand and, on interlocutory appeal, the court of appeals affirmed.

A. Factual Averments

1. Petitioners allege that PMUSA's representations that its Cambridge Lights and Marlboro Lights cigarettes "are 'lighter' (i.e., lower [in] tar and nicotine) than regular cigarettes are deceptive and misleading" under Arkansas law. Pet. App. 64a. Although styled as a challenge to PMUSA's marketing of "light" cigarettes, petitioners' state-law claims are ultimately premised on the theory that the "testing apparatus" that the federal government requires tobacco companies to use in measuring tar and nicotine yields—and upon which descriptors such as "light" are based—fails to reflect actual tar and nicotine deliveries to smokers. *Id.* at 63a. According to petitioners, consumers of Marlboro Lights and Cambridge Lights "receive higher levels of tar and nicotine than the testing apparatus registers" because individuals

smoke cigarettes with lower yields of tar and nicotine more intensely to compensate for the lower yields. *Id.* at 64a. Petitioners further allege that PMUSA "designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the testing apparatus . . . than would be delivered to the consumers of the product." *Id.* at 63a-64a. Petitioners claim that PMUSA "controlled the tar and nicotine delivery of Cambridge Lights and Marlboro Lights cigarettes under machine testing conditions apparently to achieve support for [its] representations that [its] . . . cigarettes are 'light' and contain decreased tar and nicotine." *Id.* at 64a. On behalf of a putative class, petitioners are seeking unspecified compensatory and punitive damages. *Id.* at 71a, 73a.

2. Federal law authorizes removal of state-court actions against "any officer (or any person acting under that officer) of the United States or of any agency thereof, . . . for any act under color of such office." 28 U.S.C. § 1442(a)(1). PMUSA invoked this provision because petitioners' claims directly challenge the results of the FTC's testing methodology, and because, by carrying out the tar and nicotine testing and disclosure of which petitioners complain, PMUSA was both assisting the FTC in performing its regulatory functions and acting at the direction of the FTC.

As this Court has explained, "in all cases of removal from the state courts, the jurisdiction of the [federal courts] rests and depends upon the statements made in the petition for removal." *Virginia* v. *Paul*, 148 U.S. 107, 122 (1893). Petitioners did not dispute the factual averments in PMUSA's Notice of Removal (*see* Pet. App. 58a); those averments are therefore to be taken as true in determining whether the prerequisites to Section 1442(a)(1) removal exist in this case. *Colorado* v. *Symes*, 286 U.S. 510, 515 (1932) ("As the [party opposing removal] did not join issue with any of the allegations of the petition for removal, the jurisdiction of the federal court and the validity of its action [in denying the motion to remand] are to be determined upon the allega-

tions of the petition"). The following statement summarizes the Notice of Removal (Pet. App. 74a-97a) and its supporting documentation.

a. Congress has placed significant restrictions on the tobacco industry's marketing activities, including through the enactment of the Federal Cigarette Labeling and Advertising Act (FCLAA). "[T]o the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC" (*Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 548 (2001)), which possesses authority under Section 5 of the Federal Trade Commission Act (FTCA) to prevent unfair or deceptive trade practices. 15 U.S.C. § 45(a)(1); *see also id.* § 1336; Pet. App. 78a. For more than fifty years, the FTC has repeatedly brought that regulatory authority to bear on the tobacco industry, most frequently with regard to tobacco companies' advertising and promotional statements about the tar and nicotine yields of their cigarettes.

The FTC has long sought to ensure that consumers are provided standardized information about the tar and nicotine yields of cigarettes that they can consider in making their brand choices. Pet. App. 78a. Because the various tobacco companies initially used different testing methods to substantiate their tar and nicotine advertising claims, it was impossible for consumers to draw meaningful interbrand comparisons, and in 1959, the FTC directed the tobacco industry to cease making all tar and nicotine claims, upon pain of an enforcement action for engaging in deceptive trade practices. Pet. App. 79a; J.A. 12.

In 1964, the Surgeon General issued a report that concluded that smoking causes lung cancer. J.A. 76. The report prompted the public-health community to begin an intensive inquiry into possible means of reducing the risks associated with smoking. The FTC strongly supported that effort. *See* 29 Fed. Reg. 530, 532 (Jan. 22, 1964) ("it is the Federal

Trade Commission's policy to encourage the development of less hazardous cigarettes").

Two years later, the U.S. Public Health Service issued a report concluding that the "preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful would be the effect." J.A. 25; *see also* Pet. App. 79a. In transmitting the report to Congress, the Secretary of Health, Education, and Welfare suggested that "requiring the identification of 'tar' and nicotine levels on packages and in advertising . . . would be an important step and would result in the progressive reduction of 'tar' and nicotine levels because of public demand." J.A. 23. Public-health organizations made similar recommendations to the FTC. Pet. App. 79a. The American Cancer Society, for example, wrote to "express the conviction . . . that the Federal Trade Commission can render a major service to the health of the public by rescinding its restriction relative to the mention of tar and nicotine content of cigarette smoke in cigarette advertising." Resp. C.A. App. 14; *see also ibid.* ("The National Interagency Council on Smoking and Health hopes that [the FTC] will take the steps necessary to make it permissible for cigarette manufacturers to list tar and nicotine content on the labels of cigarette packages").

The FTC's response was immediate. To "augment information available to the public on the tar and nicotine content of cigarettes" and "prompt cigarette manufacturers to develop less hazardous cigarettes" (J.A. 15), the FTC in 1966 lifted its prohibition on the advertising of tar and nicotine yields (*id.* at 20). In an effort to facilitate consumers' interbrand comparisons of tar and nicotine yields, the FTC provided that only statements substantiated by testing under the "Cambridge Filter Method" (*id.* at 21), a technique for measuring a cigarette's tar and nicotine yields that later became known as the "FTC Method" (*id.* at 76), would be permitted. Pet. App. 79a. The FTC explained that it "favor[ed] giving

smokers as much information about the risks involved in smoking as is possible and to that end favor[ed] mandatory disclosure of tar and nicotine content, as measured by a standard test." J.A. 59 (internal quotation marks omitted); *see also id.* at 21; Pet. App. 79a-80a.

The FTC Method measures the tar and nicotine yields of a cigarette's smoke using a machine that takes a two-second puff on a cigarette every minute down to a specified butt length. Pet. App. 81a. The tar and nicotine emitted from the cigarette are collected and measured by the machine, and an average tar and nicotine rating is calculated based on a sample of 100 cigarettes. *Ibid.*[1]

Shortly after designating the FTC Method as the exclusive means for computing tar and nicotine yields disclosed in advertising, the FTC held public hearings concerning possible modifications to the test's procedures. 31 Fed. Reg. 14,278 (Nov. 4, 1966); J.A. 27. During the hearings, Dr. Clyde Ogg, the Department of Agriculture employee who was the principal developer of the FTC Method, emphasized that "[s]ince smokers vary so greatly in their smoking habits, the [FTC] Method will not tell a smoker how much tar and

---

[1] The FTC specified detailed requirements for conducting the test:

> 1. Smoke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 23 mm.,
>
> 2. Base results on a test of 100 cigarettes per brand, or type,
>
> 3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection,"
>
> 4. Determine particulate matter on a "dry" basis . . . to determine the moisture content,
>
> 5. Determine and report the "tar" content after subtracting moisture and alkaloids (as nicotine) from particulate matter,
>
> 6. Report tar content to the nearest whole milligram and nicotine content to the nearest 1/10 milligrams.

32 Fed. Reg. 11,178, 11,178 (Aug. 1, 1967); J.A. 46.

nicotine he will get from any given cigarette." Resp. C.A. App. 98. Dr. Ogg explained that the FTC Method "will indicate, however, whether [a smoker] will get more from one than from another cigarette if there is a significant difference between the two and if he smokes the two in the same manner." *Ibid.* PMUSA and other tobacco companies submitted written comments that similarly explained that the FTC Method did not approximate human smoking behavior. J.A. 31-32 ("The [FTC] Method does *not* measure the *volume* of smoke—or the [particulate matter] or nicotine in the volume of smoke—that any *human being* will draw from smoking any particular cigarette") (emphases in original).

The FTC decided to retain the FTC Method as the exclusive means for measuring tar and nicotine yields, despite its knowledge that the methodology did not approximate actual smoking behavior. The FTC explained that "[n]o test can precisely duplicate conditions of actual human smoking." J.A. 53. "[T]he purpose of testing," the FTC continued, "is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method." *Id.* at 54; *see also id.* at 53 ("The [FTC] considers it most important that the test results be based on a reasonable standardized method and that they be capable of being presented to the public in a manner that is readily understandable").

b. In 1967, as part of its effort to provide standardized tar and nicotine ratings to consumers, the FTC took the "highly unusual" step of opening its own laboratory to perform testing on the tar and nicotine yields of cigarettes. J.A. 85; *see also* Pet. App. 81a. Never before had the FTC involved itself so directly in an industry, and it has not done so again since. *See* J.A. 260 (the "operation of the cigarette lab was really something that was unique") (statement of C. Lee Peeler, Deputy Director, FTC Bureau of Consumer Protection); Pet. App. 82a.

Notwithstanding the known limitations inherent in the FTC Method, the FTC adopted that methodology because, the FTC later explained, "the [testing] numbers provide legitimate comparative information to consumers attempting to lower their overall tar and nicotine consumption." Resp. C.A. App. 392. The FTC periodically published the results of its tar and nicotine tests in the *Federal Register* and also included the results in annual reports to Congress. Pet. App. 82a.

In 1987, the FTC closed its testing laboratory due to cost considerations, and delegated responsibility for testing to the Tobacco Institute Testing Laboratory (TITL), which is funded by the major participants in the tobacco industry and continues to this day to conduct tar and nicotine testing using the FTC Method. Pet. App. 82a-83a. "The methodology, processes and procedures that the . . . TITL employ[s] are identical to those the Commission . . . followed in the past." 55 Fed. Reg. 42,768, 42,768 (Oct. 23, 1990). The FTC obtains the results of that testing from the individual tobacco companies and publishes the results in the *Federal Register* and in annual reports to Congress. Pet. App. 83a; J.A. 48. The TITL performs its testing "under the supervision of a representative of the FTC" (55 Fed. Reg. at 42,768), who has unrestricted access to the laboratory to ensure that the testing is being conducted in accordance with the detailed specifications of the FTC Method. Pet. App. 83a; J.A. 86.

c. In the years immediately following the FTC's decision to lift the prohibition on the disclosure of tar and nicotine yields, relatively few tobacco companies voluntarily disclosed tar and nicotine yields in their advertising. As part of its effort to encourage consumers to rely on the FTC Method results in making their brand choices and to facilitate the development of cigarettes with lower tar and nicotine yields, the FTC in 1970 proposed a Trade Regulation Rule that would have made it an unfair or deceptive practice under Section 5 of the FTCA for tobacco companies not to disclose

tar and nicotine yields in their advertising. Pet. App. 85a. This proposal had the strong support of the public-health community. Resp. C.A. App. 16.

At the FTC's invitation, the leading tobacco companies, including PMUSA, submitted a proposed agreement to the FTC that required disclosure of FTC-measured tar and nicotine yields in all advertisements. Pet. App. 85a. The FTC sought an industry agreement from the major cigarette manufacturers because, in the words of then-Chairman Miles W. Kirkpatrick: "The Commission's objective is to insure that all cigarette advertising make[s] these tar and nicotine disclosures as soon as possible. . . . A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately." J.A. 145; *see also id.* at 147 ("The Commission believes that if the [industry agreement] operates satisfactorily, the public will, at the earliest possible time, be informed of the tar and nicotine content of cigarettes"); Pet. App. 86a.

Despite the FTC's desire to secure the mandatory disclosure of tar and nicotine yields as quickly as possible, the FTC rejected the tobacco industry's initial proposal as inadequate. J.A. 159. The major tobacco companies thereafter submitted a revised version of the agreement that included modifications to meet the FTC's specific requirements. *Id.* at 160. After subjecting the revised agreement to public comment, the FTC accepted the agreement and terminated its rulemaking proceedings, while reserving the right to reinstitute those proceedings in the event of industry noncompliance. 36 Fed. Reg. 784 (Jan. 16, 1971); J.A. 146.

Since the disclosure agreement went into effect in 1970, the FTC has strictly policed its terms and ensured that the major tobacco companies' cigarette advertisements disclose

tar and nicotine yields, as calculated using the FTC Method.[2] Indeed, the FTC has emphasized that the "public interest requires that all test results presented to the public be based on a uniform method" because "[u]se of more than one testing method would . . . only serve to confuse or mislead the public." J.A. 53. To that end, the FTC issued an advisory opinion that instructed a tobacco company that "it would be deceptive to advertise a tar figure which is *higher* than the latest applicable FTC tar figure." *In re Lorillard*, 92 F.T.C. 1035, 1035 (1978) (emphasis added); *see also* J.A. 202. The FTC cautioned that "[i]f the headlined tar level [in an advertisement] differs from the tar figure disclosed in accordance with the cigarette industry's voluntary disclosure agreement, consumer confusion might be generated." *Lorillard*, 92 F.T.C. at 1035; *see also* J.A. 202. "[T]ar values which are set forth in cigarette advertisements," the FTC emphasized, "must be consistent with the latest applicable FTC tar number." *Lorillard*, 92 F.T.C. at 1036; *see also* J.A. 202.[3]

Similarly, when another tobacco company began including testing results from an independent laboratory in its advertisements for a uniquely designed cigarette, the Barclay brand, that could not be accurately tested using the FTC Method, the FTC initiated an enforcement action against the company. *See FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985). The suit alleged that the defendant's use of results generated by a means other than the FTC Method was deceptive, and culminated in a holding that the advertisements violated Section 5 of the FTCA. *Id.* at 43.

The FTC has also repeatedly reevaluated the propriety of its tar and nicotine testing procedures and studied whether

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[2] The agreement required tobacco advertising to bear the legend "_ mg. 'tar', _ mg. nicotine av. per cigarette, FTC Report (date)." J.A. 167.

[3] The FTC is bound by its advisory opinions. *See* 16 C.F.R. §§ 1.1, 1.3.

the FTC Method should be replaced by an alternative testing procedure. Pet. App. 83a. In so doing, it has considered at length the same methodological limitation—the FTC Method's inability to replicate the variability of human smoking behavior and account for the tendency of some consumers to smoke "light" cigarettes more intensely to compensate for lower nicotine yields—that forms the basis for petitioners' claims. For example, in the early 1980s, the FTC undertook a multiyear review of its testing methodology and solicited public comments about whether the test should be modified in light of compensatory smoking behavior to reflect more accurately smokers' actual tar and nicotine intake. 48 Fed. Reg. 15,953 (Apr. 13, 1983); J.A. 129. Similarly, in 1997, the FTC initiated a still-ongoing inquiry into whether the FTC Method should be modified or abandoned altogether. 62 Fed. Reg. 48,158, 48,158 (Sept. 12, 1997). To date, the FTC has elected to retain the FTC Method, despite its known methodological limitations, because epidemiological evidence has suggested that lower FTC-measured tar and nicotine yields are associated with reduced health risks (J.A. 85), and because the FTC Method provides consumers with a meaningful tool for making interbrand comparisons regarding tar and nicotine yields. *See* 62 Fed. Reg. at 48,158 ("The purpose of the [testing] program was to provide smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands"); *see also* Pet. App. 80a-81a.

d. A number of tobacco companies, including PMUSA, use descriptors—such as "low tar," "lowered tar and nicotine," and "light"—in their marketing. The descriptors reflect the results of testing under the FTC Method and signal to consumers that certain brands have lower tar and nicotine yields under the FTC Method than other brands. The FTC has repeatedly endorsed the use of descriptors and has repeatedly defined the term "low tar" in its annual reports to Congress as denoting 15.0 milligrams or less of tar. *See* J.A.

210 n.8 ("The FTC has not defined . . . any term related to 'tar' level except for 'low tar,' which the FTC defines as 15.0 mg. or less tar"); *id.* at 213 n.11 (same); Pet. App. 86a-87a.

In 1967, just two months after beginning testing with the FTC Method, the FTC issued a policy statement explaining that it "would not challenge statements or representations of or relating to tar and nicotine content of cigarettes where they are shown to be accurately and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the" FTC. J.A. 15-16 (internal quotation marks omitted); *see also id.* at 59. The FTC repeated this policy statement in its 1968 annual report to Congress. *Id.* at 15-16.

Subsequently, through a series of consent agreements with individual tobacco companies, the FTC reaffirmed that tar and nicotine descriptors may be used to encapsulate the results of the FTC Method. Pet. App. 87a. In 1971, the FTC entered into a consent order with American Brands that permitted the company to state "in advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms," so long as "the statement is accompanied by a clear and conspicuous disclosure" of tar and nicotine yields, as measured by the FTC Method. *In re Am. Brands, Inc.*, 79 F.T.C. 255, 257 (1971); J.A. 203; *see also* Pet. App. 87a. Similarly, in 1995, the FTC entered into a consent order with the American Tobacco Company prohibiting it from making comparative claims about smokers' actual intake of tar and nicotine, while expressly providing that the company could use descriptive terms such as "low," "lower," and "lowest," in conjunction with tar and nicotine yields un-

der the FTC Method. 59 Fed. Reg. 51,980, 51,981 (Oct. 13, 1994); J.A. 219; Pet. App. 87a.[4]

Against this backdrop, PMUSA introduced Marlboro Lights in 1971 and Cambridge Lights in 1986, and marketed its Marlboro Lights as having "lowered tar and nicotine." Both brands have always had less than 15 milligrams of tar, as measured by the FTC Method; their packaging has always borne the FCLAA-mandated health warning labels; and their advertising has always included the FTC-required legend disclosing tar and nicotine yields under the FTC Method.

B. Rulings Below

Petitioners moved to remand the action to state court. In their motion, petitioners acknowledged that PMUSA "asserts that it committed the acts complained of in the Complaint on behalf of and at the direction of the United States government." Pet. C.A. App. 64. In their supporting memorandum (at 2), petitioners labeled PMUSA's extensive factual averments "fascinating, but ultimately irrelevant." Neither in the motion nor in the memorandum did petitioners dispute *any* of the factual averments in the Notice of Removal or introduce any evidence to the contrary. Indeed, they acknowledged that there was an "undisputed factual record." Pet. for Interlocutory Appeal 4. Accordingly, the averments in the Notice of Removal are taken to be both true and controlling for purposes of evaluating the propriety of removal. *See Symes*, 286 U.S. at 515.

1. The district court denied petitioners' motion to remand. Observing that the "facts surrounding the FTC's involvement with cigarette testing and advertising are not in dispute" (Pet. App. 58a), the district court surveyed the regulatory history at length, explaining that "[i]n addition to

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[4] Consistent with the FTC's policy for all consent decrees, these decrees were published for public notice and comment before being finalized. 16 C.F.R. § 2.34.

mandating the disclosure of tar and nicotine values under the FTC Method in all cigarette advertising, the FTC permits a manufacturer to advertise a cigarette as 'low tar' or 'light' if a cigarette's tar value under the FTC Method is 15.0 mg or less." Pet. App. 29a. Indeed, "the FTC has . . . expressed its view that cigarette companies engage in deceptive advertising . . . when they advertise cigarettes as 'light' or 'low tar' *without* publishing [FTC] Method test results" to substantiate such statements. *Ibid.* (emphasis added). The FTC also "inspect[s] the TITL testing facility, compel[s] cigarette manufacturers to disclose tar and nicotine ratings for all cigarettes both to the FTC and in all advertisements, and publish[es] tar and nicotine figures in the Federal Register." *Id.* at 34a.

The district court "conclude[d] that [PMUSA] acted under the direction of a federal officer within the meaning of § 1442(a)(1) when it cited the tar and nicotine values derived from the FTC Method in its Marlboro Light and Cambridge Light advertisements." Pet. App. 41a. "The FTC has repeatedly examined the very inaccuracies in the FTC Method that form the basis for [petitioners'] claims of deceptive advertising," the court continued, but "the FTC continues to this day to mandate use of the FTC Method for testing and advertising." *Id.* at 43a. Petitioners' "claim[] that [PMUSA's] advertisements are deceptive," the district court concluded, "necessarily calls into question the FTC's regulation of those advertisements." *Id.* at 44a.

2. The Eighth Circuit accepted petitioners' interlocutory appeal and affirmed. The court noted that "Section 1442(a) requires that a defendant: (1) act under the direction of a federal officer; (2) show a nexus or 'causal connection' between the alleged conduct and the official authority; [and] (3) have a colorable federal defense." Pet. App. 4a. The court deter-

mined that each requirement was met on the undisputed facts averred in the Notice of Removal.[5]

With respect to the first requirement, the court of appeals explained that "[w]hether a defendant is 'acting under' the direction of a federal officer depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." Pet. App. 6a. "Mere participation in a regulated industry," the court emphasized, "is insufficient to support removal." *Ibid.* The court determined that much more was involved than ordinary regulation:

> Here, the FTC controls the delivery of tar and nicotine information to consumers. . . . [T]he FTC itself conducted the entire testing process for twenty years and now requires the cigarette manufacturers to conduct the testing to its specifications. The FTC continues to inspect the industry labs, independently verify the results, and publish the ratings.

Id. at 9a. The FTC also "compelled the tobacco companies to adhere to a testing and advertising standard that was prompted by the FTC." *Id.* at 10a. Indeed, "[t]he FTC involved itself in the tobacco industry to an unprecedented extent," *id.* at 13a, leaving the court of appeals "convinced that the record in this case shows a level of compulsion that establishes that [PMUSA] was indeed 'acting under' the direction of a federal officer." *Id.* at 10a.

The court of appeals also concluded that there was a "causal nexus" between the FTC's direction and the acts challenged by petitioners. Pet. App. 14a. As the court ex-

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[5] The court noted a fourth requirement—that the defendant be a "person"—that it found satisfied. Pet. App. 17a-18a; *see also id.* at 35a (petitioners "do not dispute that both of the Defendant corporations are 'persons' within the meaning of § 1442(a)(1)") (both citing *Ryan* v. *Dow Chem. Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992)); note 8, *infra*.

plained, by challenging the use of "low tar descriptors such as 'lights' or 'lowered tar,'" petitioners "claim it is deceptive for [PMUSA] to use a low tar descriptor in conjunction with its cigarettes' FTC ratings." *Id.* at 14a-15a. The court recognized, however, that the FTC had determined that this conduct was not deceptive: "[t]he very combination [petitioners] challenge as deceptive is the same combination the FTC requires to *not* be deceptive." *Id.* at 15a (emphasis in original). Accordingly, "[w]hether [PMUSA]'s labeling of cigarettes as 'lights' is deceptive directly implicates the enforcement and wisdom of the FTC's tobacco policies" (*ibid.*), and petitioners' "claims are sufficiently related to the FTC's direct and comprehensive control to establish a causal connection." *Id.* at 16a.

Finally, although petitioners did not dispute the issue, the court of appeals considered whether PMUSA's federal preemption defense was "colorable." The court had "no hesitation in concluding that [PMUSA], in its Notice of Removal, has set forth a colorable federal defense." Pet. App. 17a.

Judge Gruender, who "fully concur[red] in the court's opinion and judgment," wrote separately "to emphasize that [the Eighth Circuit's decision] should not be construed as an invitation to every participant in a heavily regulated industry to claim that it, like [PMUSA], acts at the direction of a federal officer merely because it tests or markets its products in accord with federal regulations." Pet. App. 18a. "In this case, as the court's opinion makes clear, the FTC's direction and control of the testing and marketing practices at issue is extraordinary." *Ibid.* "Because the FTC passed the function of performing the testing to the cigarette companies while allowing them no independent control of the process whatsoever," Judge Gruender concluded, "this is a rare case in which federal officer jurisdiction is appropriate." *Ibid.*

SUMMARY OF ARGUMENT

The undisputed averments in PMUSA's Notice of Removal establish that petitioners' state-court action was properly removed by PMUSA pursuant to 28 U.S.C. § 1442(a)(1) under either the "assisting" standard endorsed by petitioners and the Solicitor General or the "direction and control" standard applied by the court of appeals.

A. Since its earliest iteration in 1815, the federal officer removal statute has authorized federal officers, and private parties acting on behalf or at the direction of federal officers, to remove cases to federal court. The statute provides a federal forum for federal officers and those acting under them in order to prevent state courts from impeding the implementation of federal policies. The current version of the statute authorizes removal by "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office." 28 U.S.C. § 1442(a)(1).

1. Petitioners and the Solicitor General contend that a person is "acting under" a federal officer only when that person assists or acts on behalf of a federal officer in the performance of the officer's official duties. Although that interpretation of Section 1442(a)(1) is too narrow, PMUSA's conduct would fall within the scope of the removal statute even if the standard advanced by petitioners and the Solicitor General were correct.

a. It is well-established that the federal officer removal statute is at least broad enough to encompass private persons who assist federal officers in discharging their official responsibilities. The Court has explained that "the protection which the [removal] law . . . furnishes to the [officer], also shields all who lawfully assist him in the performance of his official duty." *Davis* v. *South Carolina*, 107 U.S. 597, 600 (1883).

b. Under the undisputed averments of the Notice of Removal, PMUSA assists and acts on behalf of the FTC by conducting the official tar and nicotine testing program that the FTC itself carried out for twenty years. The FTC took the highly unusual step of opening its own cigarette testing facility in 1967 to ensure that consumers were provided with reliable, standardized data regarding the tar and nicotine yields of cigarettes. When cost considerations caused the FTC to close its facility, it delegated testing responsibility to PMUSA and the other major tobacco companies. The FTC specifies the testing procedure to be used at the industry laboratory and retains the unrestricted right to inspect the facility to ensure that its detailed testing requirements are being followed. The FTC obtains the testing results from PMUSA and publishes the results as official government data in the *Federal Register* and in reports to Congress; it also requires PMUSA to disclose the testing results in its advertising, and authorizes PMUSA to use descriptors such as "light" when those claims are substantiated by the testing results. PMUSA thereby assists the FTC in carrying out its official functions of testing the tar and nicotine yields of cigarettes and providing consumers with standardized tar and nicotine information that can be used in making brand choices. By performing the official testing program on the FTC's behalf, PMUSA "act[s] under" the FTC.

2. In any event, the standard endorsed by petitioners and the Solicitor General is unduly narrow. This Court has never limited the federal officer removal statute solely to private persons who assist or act on behalf of a federal officer. As the court of appeals recognized, removal is also available to private persons who act under a federal officer's direction and control.

a. To "act[] under" means to act "'subject to the authority, direction, or supervision'" of another. Pet. Br. 12 (quoting RANDOM HOUSE UNABRIDGED DICTIONARY 2059 (2d ed. 1993)). Petitioners point to Section 1442(a)(1)'s "color of

". . . office" requirement in an attempt to limit the definition of "acting under" to private persons who are exercising "official authority." This Court, however, has already authoritatively defined the "color of . . . office" language as requiring a "'causal connection' between the charged conduct and asserted official authority." *Willingham* v. *Morgan*, 395 U.S. 402, 409 (1969). The provision therefore distinguishes between conduct a private person performs at the direction of a federal officer (which is a basis for removal) and conduct the private person undertakes independently of the federal officer (which is not a basis for removal). The language does not impose an official authority requirement.

b. PMUSA is subject to the FTC's direction and control in testing and disclosing the tar and nicotine yields of cigarettes. As set forth in PMUSA's Notice of Removal, the FTC has exercised uniquely detailed regulatory control over the tobacco industry: It initially banned all references to tar and nicotine yields in advertising, then reversed course and authorized such disclosures when substantiated by the FTC Method, and finally—through its 1970 agreement with the tobacco industry—compelled PMUSA and the other major tobacco companies to disclose FTC Method tar and nicotine yields in all advertising. The FTC performed the tar and nicotine testing itself for twenty years, before delegating the responsibility to the tobacco industry, subject to pervasive FTC supervision. The FTC has authorized PMUSA to use descriptors such as "light" and "low tar" only if they are substantiated by the results of testing under the FTC Method. The efforts of petitioners and the Solicitor General to rewrite the history of tobacco regulation disregard the controlling averments in PMUSA's Notice of Removal and the consistent factual findings of both lower courts.

3. Although petitioners and the Solicitor General suggest that authorizing PMUSA to remove would result in a flood of removals by regulated industries, that suggestion is contradicted by the unique history of federal tobacco regula-

tion. Although many industries may be subject to federal testing requirements, it is exceedingly rare for the federal government to delegate to an industry the responsibility for carrying out official testing that the federal government itself previously performed. Authorizing removal in this unique regulatory setting would not extend Section 1442(a)(1) to participants in other regulated industries.

B. In this Court, petitioners do not dispute that their claims relate to "act[s] under color of . . . office." As the court below correctly recognized, the "causal nexus" requirement is met because petitioners' lawsuit is a direct attack upon the federal government's national tobacco policy and the testing methodology that the FTC has prescribed for determining and disclosing tar and nicotine yields.

Petitioners allege that PMUSA's use of "light" descriptors is deceptive because smokers do not receive lower levels of tar and nicotine compared to other brands, as is indicated by the FTC Method. The FTC, however, has mandated that the major tobacco companies use that testing methodology as the exclusive means of calculating tar and nicotine yields—despite the test's known inability to measure actual smokers' tar and nicotine intake—and has authorized the tobacco industry to use descriptors to reflect the results of the FTC Method. Because petitioners' suit attempts to second-guess the FTC's regulatory decision-making, it should be heard in a federal forum to ensure that state courts do not sit in judgment over the federal government's tobacco policy.

C. Petitioners do not dispute that PMUSA has a colorable federal preemption defense. *See, e.g., Brown* v. *Brown & Williamson Tobacco Corp.*, ___ F.3d ___, 2007 WL 470406 (5th Cir. 2007). The validity of that defense, of course, is a question for the district court to address in the first instance.

ARGUMENT

"[T]his Court has held that the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).'" *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981) (quoting *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969)). As the Court has explained:

> The various acts of Congress constituting the section as it now stands were enacted to maintain the supremacy of the laws of the United States by safeguarding officers *and others* acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power.

Colorado v. *Symes*, 286 U.S. 510, 517 (1932) (emphasis added). "It scarcely need be said," the Court continued, "that such measures are to be liberally construed to give full effect to the purposes for which they were enacted." *Ibid.*; *see also Willingham*, 395 U.S. at 406 ("The federal officer removal statute is not 'narrow' or 'limited'").[6]

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[6] Notwithstanding this Court's repeated holdings that Section 1442(a)(1) "is not 'narrow,'" petitioners twice refer to it as "narrow" on the very first page of their merits brief. Pet. Br. 1. Petitioners also suggest that Section 1442(a)(1) should be strictly construed. *Id.* at 30 (citing *Screws* v. *United States*, 325 U.S. 91 (1945)). The plurality in *Screws*, however, addressed the removal of state criminal prosecutions, an "'exceptional' procedure" (325 U.S. at 111) that represents a significantly greater infringement on state sovereignty than an ordinary civil removal. Whatever concerns this Court may have about broadly construing Section 1442(a)(1) in the criminal setting, those concerns are wholly inapposite in this civil action. *See Willingham*, 395 U.S. at 409 & n.4 (distinguishing between civil and criminal cases with respect to the jurisdictional showing necessary to remove under Section 1442(a)(1)). Indeed, although Congress has provided only very limited means of removing criminal

The broad construction historically afforded the removal statute reflects the reality that "[t]he legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws." *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1880). "For this very basic reason, the right of removal under § 1442(a)(1) is made absolute whenever a suit in a state court is for any act 'under color' of federal office, regardless of whether the suit could originally have been brought in a federal court." *Willingham*, 395 U.S. at 406; *see also Mesa* v. *California*, 489 U.S. 121, 136 (1989) (Section 1442(a)(1) "serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged").

THE UNDISPUTED FACTS ESTABLISH THAT THE REMOVAL REQUIREMENTS OF 28 U.S.C. § 1442(A)(1) ARE SATISFIED

To remove a case under 28 U.S.C. § 1442(a)(1), a private person must adequately allege in its notice of removal that (A) it was "acting under" a federal officer, (B) the suit is "for an[] act under color of such office," and (C) the removing party has a colorable federal defense. U.S. Br. 2. A court may exercise removal jurisdiction if the removing defendant is able to meet the requirements of Section 1442(a)(1) as to *any* of the plaintiffs' claims. *Cf. Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 560 (2005).

Thus, the central question in this case is whether "the facts disclosed by the . . . petition for removal bring the defendants within" the federal officer removal statute. *Mary-*

[Footnote continued from previous page]

prosecutions to federal court, it has repeatedly enacted legislation in recent years expanding defendants' right to remove state-law civil actions to federal court. *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4; Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

land v. *Soper (No. 1)*, 270 U.S. 9, 32 (1926). In answering that question, the Court "credit[s] the [removing defendant's] theory of the case." *Jefferson County* v. *Acker*, 527 U.S. 423, 432 (1999); *see also Willingham*, 395 U.S. at 407 ("The officer need not win his case before he can have it removed"). Where, as here, the removing defendant's factual averments stand undisputed, "no determination of fact is required, but it must fairly appear from the showing made [in the removal petition] that [the] claim is not without foundation and is made in good faith." *Symes*, 286 U.S. at 519; *see also Soper (No. 1)*, 270 U.S. at 33-34.[7]

Here, the undisputed facts set forth in PMUSA's Notice of Removal establish the prerequisites to removal under Section 1442(a)(1). Petitioners' complaint is, at its core, a direct attack upon the official tar and nicotine testing program that the FTC delegated to PMUSA and upon PMUSA's compelled disclosure of (and reliance on) those testing results. Petitioners allege that PMUSA's use of descriptors based on FTC Method results in its advertising is deceptive because consumers of Marlboro Lights and Cambridge Lights "receive higher levels of tar and nicotine than the [FTC-

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[7] Where a case is removable on the basis of a federal defense, the courts look to the removal papers to establish the bases of federal jurisdiction. *Franchise Tax Bd.* v. *Constr. Laborers Vacation Trust*, 463 U.S. 1, 11 n.9 (1983) (citing *R.R. Co.* v. *Mississippi*, 102 U.S. 135, 140 (1880), and *Gold-Washing & Water Co.* v. *Keyes*, 96 U.S. 199, 203-04 (1878)). The modern removal statute requires only "a notice of removal . . . containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). The "short and plain statement" standard is identical to the one applicable to complaints filed in federal court, *see* Fed. R. Civ. P. 8(a), and the standards should therefore be construed equivalently. *Taylor* v. *United States*, 495 U.S. 575, 597 (1990). Thus, a case removed under Section 1442(a)(1) can be remanded "only if it is clear" that jurisdiction is lacking "under any set of facts that could be proved consistent with the allegations" in the notice of removal. *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 514 (2002) (construing Rule 8) (internal quotation marks omitted).

required] testing apparatus registers" and because PMUSA purportedly "designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the . . . testing apparatus . . . than would be delivered to the consumers of the product." Pet. App. 63a-64a. As detailed in the Notice of Removal, the tar and nicotine testing results on which PMUSA bases its use of descriptors are generated while PMUSA is acting under the FTC because the FTC has delegated its official testing responsibility to PMUSA and has designated the FTC Method as the exclusive basis for any statement relating to tar and nicotine yields in advertising, including through the use of descriptors.

A. PMUSA Was "Acting Under" a Federal Officer In Testing And Disclosing Tar And Nicotine Yields

Since its earliest incarnation, the so-called "federal officer" removal statute has authorized removal not only by federal officers, but also by private parties acting at their direction or behest. Thus, the Customs Act of 1815 authorized removal by "any collector, naval officer, surveyor, inspector, or any other officer, civil or military, *or any other person aiding or assisting*, agreeable to the provisions of this act, or under colour thereof." Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198 (emphasis added); *see also* Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633 (authorizing removal by "any officer of the United States, *or other person*, for or on account of any act done under the revenue laws of the United States, or under colour thereof") (emphasis added); Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 756 (authorizing removal by "any officer, civil or military, or . . . any other person" for acts "during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress"); Act of June 30, 1864, ch. 173, § 50, 13 Stat. 241 (extending the 1833 Act).

In 1866, Congress adopted the "acting under" formulation that appears in the current statute. The Revenue Act of 1866 authorized removal by "any officer of the United States, appointed under or acting by authority of [the revenue laws]," and "any person acting under or by authority of any such officer on account of any act done under color of his office." Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171; *see also City of Greenwood* v. *Peacock*, 384 U.S. 808, 823 n.20 (1966) ("Although, in the revenue officer removal provision of the Revenue Act of 1866, Congress expressly characterized the 'other person' as one 'acting under or by authority of any [revenue] officer,' that statute obviously drew on the comparable characterization of the 'other person' in the Customs Act of 1815") (citations omitted). The Judicial Code of 1911 similarly authorized removal by "any officer appointed under or acting by authority of any revenue law of the United States" and "any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law." Act of Mar. 3, 1911, ch. 231, § 33, 36 Stat. 1097.

"Prior to 1948 the federal officer removal statute, as here relevant, was limited to revenue officers engaged in the enforcement of the criminal or revenue laws. The provision was expanded in 1948 to encompass *all* federal officers." *Peacock*, 384 U.S. at 820 n.17 (emphasis added); *see also* H.R. Rep. No. 308, 80th Cong., 1st Sess., A134 (1947). The 1948 enactment also "expressly expanded the right of removal to encompass . . . any person 'acting under' any such officer." U.S. Br. 14. The 1948 version of the statute authorized removal by "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." 28 U.S.C. § 1442(a)(1) (1948).

Congress expanded the reach of the statute again in 1996 to encompass federal agencies (Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850), in response to this Court's conclusion that the prior

version did not apply to agencies. *See Int'l Primate Prot. League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 76 (1991). In so doing, Congress explained that Section 1442(a)(1) provides a federal forum for "important and complex federal issues such as preemption." H.R. Rep. No. 798, 104th Cong., 2d Sess., at 20 (1996).

As relevant here, the current version of the statute authorizes removal by "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office." 28 U.S.C. § 1442(a)(1); *see also Mesa*, 489 U.S. at 134 ("the specialized grants of jurisdiction in the last clause of subsection (1) concerning the apprehension of criminals and the collection of revenue and subsections (2)-(4) of § 1442(a) are largely the 'residue' of the pre-1948, more limited removal statutes now entirely encompassed by the general removal provision of the first clause of subsection (1)").

Although the predecessors to the modern statute were enacted "during times of discord between States and the federal government" (Pet. Br. 1), since 1948 the statute has applied to *all* federal officers, and *all* persons acting under such officers, without regard to any such "discord." *Mesa*, 489 U.S. at 126. Congress has determined that the very possibility of state disregard of federal prerogatives is sufficient reason to invest the federal courts with jurisdiction to hear cases involving the implementation of a federal program by public or private actors. *Willingham*, 395 U.S. at 406. The statute thus allows federal officers and agencies, and private persons acting under them, to litigate their federal defenses in federal court.[8]

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[8] The Solicitor General acknowledges that "the text and genesis of the statute" indicate that "private persons" may remove under it (U.S. Br. 15), and petitioners made a similar concession below (Pet. App. 35a). One group of *amici* supporting petitioners, however, contends that *corpo-*

1. PMUSA Assists The FTC In The Performance Of Its Official Duties

Petitioners and the Solicitor General contend that a person is "acting under" a federal officer within the meaning of Section 1442(a)(1) only when that person is assisting or acting on behalf of a federal officer in the performance of the officer's official duties. Pet. Br. 14; *see also* U.S. Br. 10 ("A private person acts under a federal officer within the meaning of the federal officer removal statute only when that person acts on behalf or otherwise assists the officer in carrying out the officer's official duties"). According to petitioners, removal is appropriate where "federal control and oversight . . . is substantial and the tasks being performed are those that the government might otherwise perform itself." Pet. Br. 32-33.

Removal is authorized here even under the unduly restrictive standard advocated by petitioners and the Solicitor General. Under stringent FTC "control and oversight," the industry-operated Tobacco Institute Testing Laboratory per-

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[Footnote continued from previous page]

rations are not "persons" within the meaning of Section 1442(a)(1). Br. for Public Citizen, Inc. et al. 6. This argument was not raised by petitioners, and thus need not be considered by this Court. *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981). It is, in all events, meritless: The Dictionary Act makes clear that the term "person," unless the context requires otherwise, includes corporations. *See* 1 U.S.C. § 1. Nothing in the context of Section 1442(a)(1) requires otherwise. Contrary to *amici*'s contention (Br. for Public Citizen, Inc. et al. 10), it is hardly incongruous for the term "person" to include private corporations but not agencies. This Court has frequently given the term precisely that construction in other contexts. *See, e.g., Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 782 (2000). Moreover, *amici*'s reading would preclude many removals—for example, by government contractors—that petitioners and the government concede are appropriate. *See, e.g.*, Pet. Br. 33; U.S. Br. 25. Indeed, it would make little sense for Congress to authorize the employee of a corporation acting under a federal officer to remove, but not the corporation itself.

forms tar and nicotine testing that the FTC had "perform[ed] itself" for twenty years. When the FTC closed its own testing laboratory, it delegated its official testing responsibilities to PMUSA and the other major tobacco companies, which, under the auspices of the TITL, conduct tar and nicotine testing on the FTC's behalf. The FTC obtains the results of that testing from the tobacco companies and disseminates them in official government publications. In this manner, PMUSA assists the FTC and its officials in the performance of their statutory duties.

a. A Person Acts Under A Federal Officer When Assisting The Officer

This Court has already determined that the "acting under" requirement of Section 1442(a)(1) is at least broad enough to encompass—although not necessarily restricted to—persons who "assist" a federal officer in the discharge of his official duties.

In *Davis* v. *South Carolina*, 107 U.S. 597 (1883), the Court held that an individual who shot a suspect while assisting a U.S. marshal in making an arrest was entitled to remove a state criminal prosecution to federal court under the Revenue Act of 1866, which authorized removal by any "'officer appointed under or acting by authority of any revenue law of the United States, or any person acting under or by authority of such officer.'" *Id.* at 600. The Court explained that "the protection which the [removal] law thus furnishes to the [officer], also shields all who lawfully assist him in the performance of his official duty." *Ibid.*

Similarly, in *Soper (No. 1)*, the Court concluded that a chauffeur who drove federal prohibition agents during a raid on an illegal distillery possessed removal rights under the then-extant version of the federal officer removal statute that were identical to those of the agents themselves: As a "helper to the four officers," the Court explained, the chauffeur had the "same right to the benefit of [the removal stat-

ute] as [the officers]." 270 U.S. at 30. (The Court ultimately denied removal to all of the defendants due to the absence of the requisite causal nexus between the challenged conduct and the defendants' official activities. *Id.* at 34.)

The history of the federal officer removal statute, and this Court's interpretation of it, therefore establish that private persons may remove an action to federal court if they were "aiding or assisting" the federal officer (Customs Act of 1815); "lawfully assist[ing] him in the performance of his official duty" (*Davis* v. *South Carolina*, 107 U.S. at 600); or simply "help[ing]" a federal officer (*Soper (No. 1)*, 270 U.S. at 30). These decisions do not hold that the "acting under" provision of Section 1442(a)(1) is *limited* to defendants who are aiding or assisting a federal officer in the discharge of official duties. They do establish, though, that the provision of aid or assistance is *sufficient* to meet the "acting under" requirement of Section 1442(a)(1). Here, it is undeniable that PMUSA assists the FTC in its tar and nicotine testing program.

b. PMUSA Assists The FTC When Conducting Tar And Nicotine Testing

PMUSA is "acting under" a federal officer because it operates the TITL facility, which—subject to extensive FTC oversight—performs the delegated tar and nicotine testing responsibilities that the FTC itself carried out for two decades. PMUSA thereby aids, assists, and helps the FTC and its officers to carry out governmental functions.

The FTC opened its cigarette testing facility in 1967 in order to provide consumers with standardized tar and nicotine ratings and to encourage the development of lower tar and nicotine cigarettes. The FTC adopted the FTC Method as the sole testing methodology for use at its laboratory because it is the FTC's position that "the public interest requires that all test results presented to the public be based on a uniform method." J.A. 53. "[T]he purpose of testing," the

FTC explained, was "to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method" (*id.* at 54) and thus to generate test results "based on a reasonable standardized method . . . capable of being presented to the public in a manner that is readily understandable" (*id.* at 53).

As the former deputy director of the FTC's Bureau of Consumer Protection has explained, "the Commission's operation of a testing system for the industry at taxpayer expense was highly unusual." J.A. 85-86. The FTC took this unprecedented step in order to "provide legitimate comparative information to consumers attempting to lower their overall tar and nicotine consumption." Resp. C.A. App. 392.

When cost considerations forced the FTC to close its cigarette testing laboratory, it delegated testing responsibility to the industry-operated TITL, which conducts testing in accordance with the requirements of the FTC Method. The FTC has unrestricted access to the laboratory and closely monitors its testing procedures to ensure that the FTC Method is being accurately followed. *See* J.A. 86 ("TITL's work is regularly monitored by the Commission's contractor, . . . who has virtually unrestricted access to the laboratory and makes unannounced visits to inspect it and check the testing process"); *see also* Resp. C.A. App. 652. The FTC obtains the TITL's testing results from the individual tobacco companies and continues to publish the results in the *Federal Register* and to disclose them to Congress, as it did the results of its own laboratory testing. Pursuant to the 1970 industry agreement on tar and nicotine disclosures, these results are included in the major tobacco companies' cigarette advertising.

Just as the soldier in *Davis* was "assist[ing]" the U.S. marshal in discharging his responsibilities under the federal revenue laws and the chauffeur in *Soper* was "help[ing]" the prohibition agents perform their official duties under the pro-

hibition laws, PMUSA was delegated and is assisting the FTC in discharging its official responsibility under the FTCA to test and disclose the tar and nicotine yields of cigarettes. As an historical matter, PMUSA's delegated responsibility for testing cigarettes' tar and nicotine yields is no different from a private individual's delegated responsibility to examine imported goods to determine whether they had been shipped from England in violation of the Customs Act of 1815. Just as that private individual was "aiding or assisting" the customs officials who had previously undertaken that examination as part of their official duties, PMUSA is "aiding or assisting" the FTC, which previously performed tar and nicotine testing itself pursuant to its responsibilities under the FTCA.

PMUSA's right to remove under Section 1442(a)(1) follows from the undisputed fact that the FTC itself conducted tar and nicotine testing for twenty years, before delegating that responsibility to PMUSA and the other tobacco companies, which now perform that official function on the FTC's behalf. *See* U.S. Br. 27 (arguing that federal contractors are entitled to remove under Section 1442(a)(1) because "they perform tasks that the government would otherwise have to perform itself through its own employees"). As petitioners themselves recognize, "[t]o 'act under' means to act as a subordinate or agent of another, subject to the other's control or supervision in exercising the other's authority." Pet. Br. 12; *see also* U.S. Br. 11 ("'under' is commonly used to describe a person or entity in a subordinate position who acts on behalf of or otherwise assists the person in the superior position to carry out the superior's duties"). That is precisely what PMUSA does when, subject to extensive FTC supervision, it tests cigarettes on behalf of the FTC. There is no suggestion that the FTC lacked authority to conduct the tests itself for twenty years, or to disclose the results of those tests to Congress and the public; when the FTC ordered the industry to instead perform the testing (under the FTC's control),

the identical conduct was no less authorized by federal law. And just as an FTC official could have removed a suit challenging the testing methodology and FTC-authorized descriptors, so too may PMUSA.

The Solicitor General nevertheless contends that PMUSA is "not producing a product or service that the government would otherwise be forced to produce for itself through its own employees." U.S. Br. 28. That assertion is flatly contradicted by the undisputed fact that PMUSA is providing both a service (tar and nicotine tests) and a product (the results of those tests, which are conveyed by the FTC to Congress and the public) that the government previously produced for itself through its own employees. Pet. App. 82a-83a. Thus, when it comes to testing cigarettes for tar and nicotine, PMUSA can hardly be said to be an "officious intermeddler." U.S. Br. 13. The testing method is prescribed by the FTC, the industry's laboratory is inspected by the FTC, and the results are reported by the FTC to Congress and the public. The FTC has, effectively, contracted out its testing obligations—the obligations it had shouldered itself for twenty years in the exercise of its official authority—to PMUSA and other industry participants.

The Solicitor General points to *Magnin* v. *Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996), as an example of a case where removal under Section 1442(a)(1) was appropriate. U.S. Br. 26. There, a private individual was delegated authority to inspect aircraft by the Federal Aviation Administration. Here, PMUSA has been delegated authority to test cigarettes by the FTC. Thus, just as surely as an employee of the FTC's testing laboratory would have been able to invoke Section 1442(a)(1) to remove a suit challenging the FTC's methodology for testing cigarettes, PMUSA is authorized to remove this suit challenging the FTC Method, the TITL's testing results, and the corresponding descriptors be-

cause PMUSA has been delegated the FTC's testing responsibilities and is assisting and acting on behalf of the FTC.[9]

Based on the undisputed averments of its Notice of Removal, PMUSA has therefore established that, under the standard advocated by petitioners and the Solicitor General, it is "acting under" the FTC for purposes of Section 1442(a)(1).

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[9] In *Dixson* v. *United States*, 465 U.S. 482 (1984), the Court held that officers of a private, nonprofit corporation that administered a federal community development block grant were "public officials" for purposes of the federal bribery statute, 18 U.S.C. § 201(a), because they were "acting for or on behalf of the United States" within the meaning of the statute. The defendants had been delegated the official role of administering a social service program established by Congress, subject to federal guidelines governing distribution of the funds, and the Court concluded that they were "acting for or on behalf of the United States" in implementing that program. *Dixson*, 465 U.S. at 497. Like the defendants in *Dixson*, PMUSA—through its operation of the TITL—is "acting . . . on behalf of the United States" by performing official testing responsibilities delegated to it by the federal government. *See Peterson* v. *Blue Cross/Blue Shield of Tex.*, 508 F.2d 55, 57 (5th Cir. 1975) (holding that a corporation delegated official responsibility for administering aspects of the Medicare program was entitled to remove under Section 1442(a)(1)). Contrary to petitioners' intimation (Pet. Br. 14), there is no inconsistency in PMUSA's argument that, on the one hand, it is "acting under" a federal officer in its acts of testing and disclosing the tar and nicotine yields of cigarettes, but that, on the other hand, it is a private company whose operations in general are its own and not the government's. *See Brown* v. *Philip Morris Inc.*, 250 F.3d 789, 800 (3d Cir. 2001) (rejecting a *Bivens* action against the tobacco companies because they could not be considered federal actors). That a private party may carry a federal mantle for some purposes does not mean that such an entity is coextensive with the government for all purposes, including the constitutional constraints on government actors.

2. Alternatively, PMUSA Is Subject To The FTC's Direction And Control

This Court has never established a definitive standard for determining whether a private party is "acting under" a federal officer for purposes of Section 1442(a)(1). Although the Court's precedents indicate that aiding or assisting a federal officer is *sufficient* to satisfy the "acting under" standard, they do not establish that the provision of aid or assistance is *necessary* to meet that requirement. Indeed, this Court has never decided a case in which it has held that a private party failed to meet the "acting under" standard, and thus the outer bounds of that requirement have not been defined.

This Court has recognized that the federal officer removal statute has particular application where state law "affix[es] penalties to acts done under the *immediate direction* of the national government, and in obedience to its laws." *Tennessee* v. *Davis*, 100 U.S. at 263 (emphasis added). In this case, petitioners seek state-law "penalties"—compensatory and punitive damages—for "acts done" by PMUSA "under the immediate direction of the national government"—the testing and disclosure of tar and nicotine yields—"in obedience to its laws"—the FTCA and FCLAA.

Accordingly, in addition to being entitled to removal under the "assisting" standard endorsed by petitioners and the Solicitor General, PMUSA is authorized to remove this case under the standard applied by the court of appeals because it was acting under the FTC's direction and control when carrying out the tar and nicotine testing program and when using FTC-approved descriptors that correspond to those testing results.

a. A Person Acts Under A Federal Officer When Subject To The Officer's Direction And Control

As *Tennessee* v. *Davis* indicates, the "acting under" requirement can be met where a private party acts at the direc-

tion of a federal officer. Indeed, the plain meaning of the phrase "acting under" is to act "'subject to the authority, direction, or supervision'" of another. Pet. Br. 12 (quoting RANDOM HOUSE UNABRIDGED DICTIONARY 2059 (2d ed. 1993)). It was thus no accident that the Court in *Soper (No. 1)* noted that the chauffeur was employed "under [the officers'] order and *by direction* of [a superior officer]." 270 U.S. at 30 (emphasis added).

Petitioners, however, suggest that the private individual acting under a federal officer must not only be subject to the officer's direction and control but also must be subject to that control "in exercising the [federal officer's] authority." Pet. Br. 12. This gloss on the plain meaning of "acting under" has no support in the statutory text. A private company is just as much "acting under" a federal officer when that officer compels the company to take, or refrain from, certain action—for example, by prescribing the circumstances under which the company can include specific language in its advertising—as when the federal officer requires the private individual to perform a portion of its own official responsibilities. As petitioners' own dictionaries state, to act under someone means to act "'subject to the bidding or authority of'" that person (Pet. Br. 12 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2487 (2002))), and there is simply no basis for reading into those two words an additional requirement that the person acting under a federal officer discharge the officer's official responsibilities. *See also* U.S. Br. 11 ("In ordinary parlance, the term 'under' indicates, *inter alia*, 'subjection, guidance, or control'") (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2765 (2d ed. 1958)).

To support their strained attempt to insert an "official authority" requirement into the "acting under" clause, petitioners point to the provision of Section 1442(a)(1) limiting removal to "any act under color of . . . office," which petitioners contend "evinces Congress's expectation that a removing

party . . . will have some claim to have been acting in an official capacity in carrying out public functions." Pet. Br. 13. But this Court has already defined the "act[ing] under color of . . . office" requirement in Section 1442(a)(1) as requiring "a showing of a 'causal connection' between the charged conduct and asserted official authority." *Willingham*, 395 U.S. at 409. The "color of . . . office" requirement therefore separates the conduct that a federal officer performs as a result of his official position (which entitles him to removal) from conduct unrelated to that position (which does not entitle him to removal).

Where a private person is "acting under" a federal officer, the "color of . . . office" requirement similarly distinguishes between conduct the person undertakes at the direction or behest of the federal officer (which is a basis for removal) from independent activities that are unrelated to the federal officer's directions (which do not constitute a basis for removal). Thus, although PMUSA is "acting under" the FTC at least some of the time, it is only entitled to remove those suits that challenge activities undertaken in the course of "acting under" the FTC. The "color of . . . office" requirement establishes the subject-matter constraints on the cases that federal officers and those acting under federal officers can remove to federal court. It does not, as petitioners suggest, superimpose an "official authority" requirement on the "acting under" clause.[10]

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[10] In light of this Court's explicit and unambiguous construction of the "color of . . . office" requirement in *Willingham*, petitioners' attempt to analogize that phrase to the "color of law" requirement of 42 U.S.C. § 1983 (Pet. Br. 13-14) is specious. Whatever the definition of that dissimilar statutory language found in a dissimilar statutory provision, it does not undermine this Court's determination that, as used in Section 1442(a)(1), the "color of . . . office" requirement denotes a "causal nexus" between the conduct in question and the federal officer's direction or control of the person "acting under" his authority. *Willingham*, 395 U.S. at 409; *Soper (No. 1)*, 270 U.S. at 33.

Moreover, petitioners' radical assertion that a "private commercial actor . . . cannot sensibly be said to act 'under color of [federal] office'" (Pet. Br. 9 (brackets in original)) would foreclose removal to federal contractors ("private commercial actor[s]") that assist federal officers in performing their duties or act at the express direction of federal officers. The lower courts have uniformly held that such contractors are entitled to removal under Section 1442(a)(1). *See* Br. of Defense Contractors et al. 7 n.6 (citing cases). The Solicitor General largely agrees. *See* U.S. Br. 25. And if those contractors may remove, then the "commercial" nature of PMUSA's business cannot, in itself, be any barrier to removal. *See also infra* at 38.

Petitioners also make the blanket assertion that "a private regulated party sued for conduct undertaken while acting in compliance with federal regulation" is not entitled to removal under Section 1442(a)(1). Pet. Br. 17. That is obviously incorrect. Such a party might, or might not, be "acting under" a federal official—the mere fact that a party is regulated cannot *exclude* it from the class of "persons" eligible to remove under Section 1442(a)(1). Indeed, when amending Section 1442(a)(1) in 1996, Congress expressly recognized that the statute provides a federal forum for "important and complex federal issues *such as preemption.*" H.R. Rep. No. 798, 104th Cong., 2d Sess., at 20 (1996); *see also* 142 Cong. Rec. S6517, S6519 (June 19, 1996) (statement of Sen. Grassley). Because preemption is not generally invoked as a defense by the federal government or federal officials, this statement is a clear indication that Section 1442(a)(1) extends to private persons subject to federal regulation. Whether such a person is acting under federal direction will necessarily depend on the facts and circumstances of each case, as averred in the notice of removal.

b. PMUSA Is Subject To The FTC's Direction And Control In Testing And Disclosing Tar And Nicotine Yields

The court of appeals closely examined the allegations in PMUSA's Notice of Removal concerning the FTC's lengthy history of tobacco regulation. It also considered the extensive documentary record supporting those allegations, and concluded that the "record is filled with FTC announcements of its policy as well as communications between the FTC and the cigarette industry." Pet. App. 13a. Surveying the "unprecedented extent" to which the FTC involved itself with the tobacco industry and low-tar cigarettes, the court of appeals held that the FTC exercises "comprehensive, detailed regulation" over the industry's testing and marketing practices and that PMUSA was therefore "acting under" the FTC in connection with the conduct alleged in petitioners' complaint. *Id.* at 8a. This conclusion is amply supported by the undisputed factual allegations in PMUSA's Notice of Removal, which sets forth in detail the FTC's stringent control over PMUSA's testing and disclosure of tar and nicotine yields.

The FTC initially required PMUSA to stop disclosing tar and nicotine yields in its advertising (Pet. App. 79a), then authorized it to begin disclosing testing results substantiated by the FTC Method (*ibid.*), and finally compelled it to include those results in all advertisements (*id.* at 85a). This is exactly the type of "immediate direction [by] the national government" (*Tennessee* v. *Davis*, 100 U.S. at 263) that can support removal under Section 1442(a)(1). PMUSA conducts tar and nicotine testing of its cigarettes pursuant to a delegation of FTC authority and using a methodology prescribed by the FTC, and, under FTC compulsion, it discloses those testing results in its advertisements and limits its use of descriptors to statements substantiated by the FTC Method. In conforming to those FTC directives, PMUSA is—under the very definitions adopted by petitioners and the Solicitor

General—"acting under" a federal officer. *See* Pet. Br. 12 (defining "under" as "subject to the authority, direction, or supervision of") (internal quotation marks omitted); U.S. Br. 11 ("'under' indicates . . . '[s]ubject to the guidance and instruction of'") (brackets in original).

This conclusion is supported by cases, largely embraced by petitioners (Pet. Br. 32-33), in which the lower courts have upheld removal by government contractors subject to stringent federal oversight. In *Winters* v. *Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), for example, a case relied upon by the court of appeals below, the court held that manufacturers of the pesticide Agent Orange were authorized to remove a state-law products liability suit under Section 1442(a)(1) because the government provided "detailed specifications concerning the make-up, packaging, and delivery of Agent Orange, [and] the compulsion to provide the product to the government's specifications." *Id.* at 400. The level of government control over the Agent Orange producers is comparable to the government's control over PMUSA. Just as the government compels the manufacturers of Agent Orange to produce their pesticide in a specific manner and to utilize specific labeling, it requires PMUSA to test its cigarettes subject to detailed technical specifications and to disclose its cigarettes' tar and nicotine yields in advertisements.

The efforts of petitioners and the Solicitor General to concoct a revisionist history of the FTC's tobacco regulatory regime are clearly flawed. As an initial matter, in attempting to deny that the past fifty years of FTC tobacco regulation ever took place, petitioners and the Solicitor General disregard the averments in PMUSA's Notice of Removal, which were not disputed below by petitioners and are controlling for purposes of this Court's jurisdictional analysis. *See Virginia* v. *Paul*, 148 U.S. 107, 122 (1893); *Symes*, 286 U.S. at 515. Moreover, the arguments advanced by petitioners and the Solicitor General fail on their own terms.

Petitioners contend, for example, that PMUSA's disclosure of tar and nicotine yields in its advertisements does not occur under federal "direction or supervision" because the 1970 industry agreement requiring disclosure was entered into on an ostensibly "voluntary" basis. Pet. Br. 39. But as the court of appeals recognized, the "FTC effectively used its coercive power to cause the tobacco companies to enter the agreement" (Pet. App. 10a) and accepted that agreement only after the tobacco industry had modified its initial proposal to meet the FTC's specific requirements. If the FTC had not proposed a Trade Regulation Rule mandating the disclosure of tar and nicotine yields, the major tobacco companies would not have entered into the agreement, which was indisputably a byproduct of the FTC's proposed rulemaking. Indeed, just as a driver threatened by a police officer with the issuance of a parking ticket cannot be said to have moved his car voluntarily, PMUSA—threatened with the promulgation of a rule mandating tar and nicotine disclosures—cannot be said to have voluntarily assumed the burden of testing for and disclosing tar and nicotine yields.

Furthermore, the FTC has closely monitored the industry's compliance with the obligations imposed by the 1970 agreement, and has brought suit against tobacco companies that disclose testing results obtained through means other than the FTC Method prescribed by the agreement. *See, e.g.*, *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43 (D.C. Cir. 1985) (holding that a tobacco company's advertising that included tar and nicotine yields measured through a test different than the FTC Method constituted a deceptive trade practice under Section 5 of the FTCA).[11] The ever-

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[11] Petitioners' reliance (Br. at 40) upon *Brown & Williamson* to support their assertion that the FTC has not compelled tobacco companies to disclose FTC Method results in their advertising is squarely refuted by the procedural posture of the case—a suit brought by the FTC for the specific purpose of preventing a tobacco company from disclosing tar and nico-

present threat of an enforcement action is a powerful means of compelling PMUSA to comply with the FTC's advertising requirements. *See* Pet. App. 11a ("The main difference between a formal rule and an agreement is that the FTC enforces the disclosure of the [FTC] Method's results by bringing an action against the company for deceptive advertising rather than directly enforcing a regulation").

Petitioners also make much of the fact that the FTC's regulation of the use of tar and nicotine descriptors supposedly has been accomplished through consent orders with other tobacco companies. In so arguing, however, petitioners disregard the FTC's 1967 policy statement, which unambiguously authorized the tobacco industry to make "statements or representations of or relating to tar and nicotine content of cigarettes where they are shown to be accurately and fully substantiated" by testing under the FTC Method. J.A. 15 (internal quotation marks omitted).

Moreover, as former FTC Chairman Daniel Oliver explained in congressional testimony, the FTC utilized consent orders, rather than rulemaking, in this area because they provided the most expeditious manner of regulating industry-

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tine yields generated by means other than the FTC Method. The court of appeals determined that the FTC bore the burden of establishing that the tobacco company's advertising practices were deceptive because it had not promulgated its tar and nicotine disclosure requirements through a Trade Regulation Rule. 778 F.2d at 45. But this burden allocation does not alter the fact that the FTC possesses the authority—and in *Brown & Williamson* it exercised that authority—to bring enforcement actions against tobacco companies that fail to comply with the 1970 industry agreement. Petitioners' invocation (Br. at 41) of PMUSA's 2002 petition for FTC rulemaking is equally misplaced. In that petition, PMUSA acknowledged that the FTC "require[s] the use of the [FTC] Method" for measuring tar and nicotine yields (petition at 6), and merely asked the FTC to consider whether modifications to its existing regulatory regime were warranted in light of new scientific developments (*id.* at 5).

wide conduct. J.A. 115; *cf. NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[A]djudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein") (internal quotation marks omitted). The FTC "discovered," Chairman Oliver testified, "that rulemaking takes a very long time," and that "it is more efficient to bring a single case against the first offender in order to stop the practice before we go to rulemaking." J.A. 115. "In the case of the cigarette industry," the Chairman continued, "it is entirely reasonable to suppose that one action against one cigarette company would have an effect on all of them, and that you would not have to make a rule." *Id.* at 116-17.

Indeed, courts have repeatedly recognized that FTC consent orders have regulatory effects that extend well beyond the parties to the agreement. *See, e.g., Gen. Motors Corp.* v. *Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) (holding that FTC consent orders can preempt state legislation); *Ford Motor Co.* v. *FTC*, 547 F.2d 954, 959-61 (6th Cir. 1976) (holding that the FTC must afford the same treatment to one competitor that it has allowed to another competitor in an earlier consent order). Petitioners' lengthy discussion (Br. at 45) of cases addressing the precedential value of FTC consent orders is thus entirely beside the point. Whether or not the consent orders into which the FTC entered with American Brands and the American Tobacco Company are considered binding precedent in third-party actions, they instruct the tobacco industry that the FTC considers the use of descriptors to be nondeceptive—and will not initiate enforcement proceedings regarding such marketing practices—as long as the descriptors are accompanied by tar and nicotine testing results under the FTC Method.

The Solicitor General further maintains that PMUSA is not required to market "light" cigarettes and that "it does so solely in furtherance of its own economic interest." U.S. Br. 27. But the Solicitor General is answering the wrong ques-

tion. PMUSA has not argued, and the courts below did not hold, that PMUSA was "acting under" the FTC in "marketing" its products. Rather, PMUSA has maintained, the courts below held, and the undisputed evidence establishes, that PMUSA *was* acting on the FTC's behalf when it tested the tar and nicotine yields of its cigarettes, and that PMUSA *was* acting at the direction of the FTC when it disclosed the results of those tests (including when using FTC-approved descriptors corresponding to the FTC Method results) to consumers. That is all that is required to meet the "threshold" requirement of Section 1442(a)(1) removal.[12]

3. The Parade Of Horribles Imagined By Petitioners And Their *Amici* Is Illusory

Whether this Court applies the "assisting" standard endorsed by petitioners and the Solicitor General, or a "direction and control" test similar to that applied by the court of appeals, the undisputed averments in the Notice of Removal establish that PMUSA was "acting under" a federal officer in its cigarette testing and in its dissemination of the testing results. Pursuant to the FTC's policy of providing the public with standardized information about cigarettes' tar and nicotine yields, PMUSA conducts testing previously performed—and delegated to it—by the FTC and, under legal compulsion, discloses the FTC Method results both to the FTC, which reprints them as official government data, and to con-

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[12] This Court should scrutinize the Solicitor General's contrary position, and his attempted recharacterization of the FTC's regulatory history, with particular care because the Justice Department is currently engaged in litigation with PMUSA and the other major cigarette manufacturers, where one of the principal issues is the extent to which the FTC regulated PMUSA's use of tar and nicotine descriptors. *See United States* v. *Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) (enjoining the use of "light" descriptors), *appeal docketed*, No. 06-5267 (D.C. Cir. Sept. 11, 2006) (stay granted pending appeal). Because of that ongoing litigation, the Solicitor General can hardly be characterized as a disinterested party in this case.

sumers. Because PMUSA is acting at the FTC's behest, and pursuant to its direction, a federal forum is warranted to "permit[] a trial ... free from local ... prejudice" (*Manypenny*, 451 U.S. at 242) toward the FTC's tobacco policies.

Both petitioners and the Solicitor General, however, devote a significant portion of their briefs to suggesting that authorizing PMUSA to remove this case would occasion a flood of removals under Section 1442(a)(1), crippling the federal courts and undermining state sovereignty. Pet. Br. 34-39; U.S. Br. 19-23. These assertions are decidedly overstated because the unique history of tobacco regulation sets PMUSA apart from participants in other regulated industries who, although perhaps closely regulated by the federal government, do not perform delegated federal responsibilities in the same manner that PMUSA and other tobacco companies do. *See* Pet. App. 18a (Gruender, J., concurring). Under the auspices of the TITL, PMUSA is carrying out a testing program that the FTC itself conducted for twenty years. Petitioners identify no other industry where private companies have been delegated a testing function that the government itself previously performed and are compelled to disclose the testing results to the government, which disseminates the industry-generated data in official government publications. *See* Br. of Public Citizen, Inc. et al. 20 ("it may have been 'unprecedented' *for the FTC* to involve itself in product testing as it did with cigarettes") (emphasis in original).

A narrow decision holding that this extraordinary testing procedure—in combination with the stringent oversight the FTC exercises over the tar and nicotine claims in tobacco advertising—affords PMUSA the ability to remove this case to federal court would not extend the same removal right to other regulated industries. No matter the degree of regulatory oversight, those industries would not be performing delegated federal responsibilities unless the private industry participants were conducting an official function on behalf of the federal government. Petitioners' discussion of the coal-

mining, motor vehicle, medical device, and pesticide industries is therefore completely beside the point (Pet. Br. 35) because petitioners do not suggest that private participants in any of those industries perform delegated official responsibilities previously conducted by the federal government (and, to the extent that isolated examples do exist in other industries, the prevalence of this phenomenon would be far too rare to foster the exponential growth in removal predicted by petitioners and the Solicitor General).

B. PETITIONERS' SUIT RELATES TO "ACT[S] UNDER COLOR OF . . . OFFICE"

In order to establish that a suit pertains to "act[s] under color of . . . office," a private party seeking to remove under Section 1442(a)(1) must demonstrate the existence of a "causal nexus" between the conduct that the plaintiff challenges and the official authority under which the party was acting. *See Willingham*, 395 U.S. at 409.

The causal nexus element of Section 1442(a)(1) is not at issue here. Petitioners declined to seek review of the court of appeals' holding that PMUSA has established a causal nexus between the conduct alleged in petitioners' complaint and the official authority under which PMUSA was acting—choosing instead to frame the question presented solely in terms of whether PMUSA was "acting under" a federal officer. *See* Pet. i. This Court, of course, does not ordinarily review questions not presented in the petition. *See Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *United States Philips Corp.*, 510 U.S. 27, 31 (1993). Nor do petitioners address the causal nexus element in their merits brief.

Were the Court nevertheless to reach the issue, it would have little difficulty concluding that PMUSA has satisfied the "causal nexus" requirement. Petitioners allege, for example, that "consumers receive higher levels of tar and nicotine than the testing apparatus registers" and that PMUSA was able to "control[] the tar and nicotine delivery of Cam-

bridge Lights and Marlboro Lights cigarettes under machine testing conditions apparently to achieve support for [its] representations that [its] ... cigarettes are 'light' and contain decreased tar and nicotine." Pet. App. 64a. Petitioners thus expressly challenge the FTC's decision to require the tobacco industry to use the FTC Method despite its inherent limitations. Indeed, it is impossible for petitioners to do otherwise: The FTC Method is the only authorized means for tobacco companies to provide tar and nicotine yield information to consumers (either numerically or as the basis for descriptors such as "lights"). By challenging PMUSA's descriptors, petitioners are necessarily challenging the underlying testing that PMUSA performs on behalf of and under the direction and control of the FTC. *See* Pet. App. 16a (petitioners "challenge the FTC's policy judgment that despite the failure of the [FTC] Method to take into account ventilation holes or channels, the test results should still be included in advertising").[13]

Petitioners' assault on FTC-approved descriptors is a direct attack upon the tobacco policy implemented by the relevant arm of the federal government for the past half century. Because petitioners' claims "directly implicate[] the enforcement and wisdom of the FTC's tobacco policies" (Pet. App. 15a), this suit creates the possibility that state-court judges and juries who disagree with those policies will hold PMUSA liable for conduct that the FTC has expressly authorized or mandated. As petitioners acknowledge, Section 1442(a)(1) "safeguard[s] against state judicial action that ... could interfere with the enforcement and operation of national laws." Pet. Br. 1; *see also* U.S. Br. 1 ("Permitting per-

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[13] The FTC is pursuing an ongoing inquiry into whether the FTC Method should be modified or abandoned. 62 Fed. Reg. 48,158 (Sept. 12, 1997). As part of that process, the FTC is evaluating the same methodological limitations in the testing procedure that petitioners raise in their complaint. *Id.* at 48,159.

sons who are properly viewed as acting under a federal officer to remove state law actions to federal court ensures that state courts will not interfere with the operations of the federal government"). That is precisely what could happen if this case were remanded for a state court to sit in judgment regarding the FTC's direction and control of the tobacco industry.

C. PMUSA HAS A COLORABLE FEDERAL DEFENSE

The court of appeals held (Pet. App. 17a), and petitioners did not dispute below and do not contest here, that PMUSA has a colorable preemption defense based either on the express preemption provision of FCLAA or on the conflict between petitioners' state-law consumer fraud claims and the FTC's policies regarding tar and nicotine testing and advertising. Indeed, a number of courts have held that state-law claims similar to petitioners' are preempted. *See, e.g.*, *Brown* v. *Brown & Williamson Tobacco Corp.*, ___ F.3d ___, 2007 WL 470406 (5th Cir. 2007) (holding that a virtually identical "lights" claim was preempted by FCLAA); *Good* v. *Altria Group, Inc.*, 436 F. Supp. 2d 132 (D. Me. 2006), *appeal docketed*, No. 06-1965 (1st Cir. June 23, 2006).

Petitioners note that PMUSA does not have a defense of "official immunity" available to it. *See* Pet. Br. 19. But as this Court has explained, "removal under 28 U.S.C. § 1442(a) must be predicated upon averment of *a* federal defense," *Mesa*, 489 U.S. at 139 (emphasis added), not any *particular* federal defense. It is sufficient that "a Federal question or a claim to a Federal right is raised in the case, and must be decided therein." *Tennessee* v. *Davis*, 100 U.S. at 262; *see also Mesa*, 489 U.S. at 136. Indeed, when amending Section 1442(a)(1) in 1996, Congress identified the adjudication of preemption defenses in federal court as one of the rationales for federal officer removal. *See* H.R. Rep. No. 798, 104th Cong., 2d Sess., at 20 (1996) (Section 1442(a)(1)

provides a federal forum for "important and complex federal issues such as preemption"); 142 Cong. Rec. S6517, S6519 (June 19, 1996) (statement of Sen. Grassley) (same). This Court has recognized that the same objectives that underpin the preemption doctrine—the prevention of state interference with federal policies (*Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941))—also animate federal officer removal, which "is required for the preservation of that supremacy which the Constitution gives to the general government by declaring that the Constitution and laws of the United States made in pursuance thereof . . . shall be the supreme laws of the land." *Tennessee* v. *Davis*, 100 U.S. at 266.

The merits of PMUSA's defense of preemption, of course, are for the district court to decide in the first instance. *See Acker*, 527 U.S. at 432 ("requiring a 'clearly sustainable defense' [at the removal stage] rather than a colorable defense would defeat the purpose of the removal statute"). This case comes to the Court on extensive undisputed facts, as set forth in the Notice of Removal. That those facts would establish a "colorable" defense of federal preemption cannot seriously be disputed, because other courts have held, on summary judgment, that similar facts are sufficient to sustain such a defense. *See, e.g.*, *Brown*, ___ F.3d ___, 2007 WL 470406. Indeed, PMUSA has moved for summary judgment on that ground in the district court. That motion has not yet been adjudicated, and thus the merits of the preemption defense are not before the Court in this case. The *only* question before the Court is whether the case was properly removed under 28 U.S.C. § 1442(a)(1).

* * *

The question petitioners have asked this Court to answer is "[w]hether a private actor doing no more than complying with federal regulation is a 'person acting under a federal officer' for the purpose of 28 U.S.C. § 1442(a)(1)." Pet. i. The answer to that question is: "It depends." In many cases, petitioners' question should be answered in the negative because

"mere" regulation does not satisfy the "acting under" requirement. But it cannot be that petitioners' question must also be answered in the negative if the relationship between the private actor and federal officials, as alleged in the notice of removal, establishes that the defendant assisted, or acted at the specific direction of, a federal officer. If that were the case, then private parties would be effectively excluded from the reach of the federal officer removal statute, contrary to the text, history, and structure of the statute, as well as this Court's precedents.

In this case, PMUSA is doing much more than merely "complying with federal regulation." As the court of appeals explained, "[t]hroughout the record, there [are] several indications that both developing a testing method and carrying out the testing evidenced an unusually high level of governmental participation and control." Pet. App. 13a; *see also ibid.* ("[t]he record establishes that [PMUSA] acted under the direction of a federal officer"). The sole question before the Court is whether that same record—the undisputed averments of the Notice of Removal and the evidence submitted in support thereof—shows that PMUSA was "acting under" a federal officer in testing and disclosing the tar and nicotine yields of its cigarettes, as the courts below held. *That* question, which is the only one properly before the Court, should be answered in the affirmative.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTRODUCTION

Congress enacted the federal officer removal statute to ensure that federal officers (and later agencies) would have a means of removing to federal court cases brought against them in state court. The primary purpose was to provide a federal forum for immunity defenses that federal officers and those "acting under" them could assert. As this Court's cases establish, persons "acting under" such officers or agencies are persons who aid or assist in the performance of official functions. Under any reasonable view, Philip Morris in its marketing and sale of cigarettes is considerably far afield of the type of actor Congress intended the statute to protect.

In its brief, Philip Morris largely abandons the comprehensive-control theory that it has advanced in numerous cases in the lower courts and that it led the Eighth Circuit below erroneously to embrace. That theory, which opened up the statute to removals by scores of companies regulated far more heavily than tobacco companies, finds no support in this Court's cases construing the federal officer removal statute. Instead, Philip Morris now argues that cigarette makers are unique not because of the degree of governmental control over their operations, but because of what they assert to be the historical happenstance that the FTC for a time tested the tar and nicotine content of cigarettes and then stopped doing so, imposing instead a reporting requirement on cigarette makers. That newfound theory, however, is no more persuasive than Philip Morris's previous arguments to obtain § 1442(a)(1)'s benefits. It rests on mischaracterizations of the complaint, the procedural effect to be given to its removal notice, the facts underlying the FTC's decision to stop testing cigarettes for tar and nicotine, and the regulatory consequences of the FTC's actions. Philip Morris's new theory therefore should be rejected just as decisively as its former theory has now essentially been discarded.

ARGUMENT

I. PHILIP MORRIS'S "DELEGATED AUTHORITY" THEORY IS WITHOUT MERIT

Largely forsaking its defense of the Eighth Circuit's comprehensive-control test, Philip Morris asserts (at 26-32) that it is "acting under" a federal officer for purposes of 28 U.S.C. § 1442(a)(1) because, in testing the tar and nicotine yields of its cigarettes, it exercises authority "delegated" to it by the FTC. This theory — which reflects a sea change in Philip Morris's position[1] — rests on two flawed premises: first, that petitioners' state-law claims challenge Philip Morris's cigarette-testing program; and, second, that Philip Morris conducts the testing program on behalf of, and by delegation of authority from, the FTC.

A. Petitioners' Claims Do Not Challenge The Cambridge Filter Method

Philip Morris concedes (at 42) that it is not "acting under" the FTC in marketing and selling its light cigarettes in compliance with FTC regulation. That concession should be dispositive here, because the claims that it purported to remove relate solely to its marketing and sale of light cigarettes.[2]

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[1] Until it filed its brief on the merits in this Court, Philip Morris consistently argued simply that federal officer removal is proper whenever "a defendant [is] sued for actions that were subject to the direction, control, and supervision of federal officials." PM Br. in Opp. 10. It accordingly offered no counterstatement of the Question Presented [illegible]th in the petition for a writ of certiorari. In its brief on the mer[illegible] however, Philip Morris attempts for the first time to reformulate the Question Presented to fit its new "delegation" theory. *See* PM Br. i. Having accepted petitioners' formulation at the certiorari stage, Philip Morris is not free to recast the issue before this Court to accommodate its newly developed theory of the case: "Under this Court's Rule 15.2, a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (internal quotation marks omitted).

[2] Philip Morris itself repeatedly acknowledged below that petitioners' claims were focused on its marketing practices. *See, e.g.*, PM C.A.

In accordance with its new theory of the case, however, Philip Morris now insists that "[p]etitioners' complaint is, at its core, a direct attack upon the official tar and nicotine testing program that the FTC delegated to" Philip Morris. PM Br. 22. But Philip Morris cannot manufacture a right of removal simply by recharacterizing petitioners' claims to suit its new legal theory.

The essence of petitioners' claims is that Philip Morris intentionally designed its "light" cigarettes — by, among other things, "modification of tobacco blend, weight, rod length, and circumference," "use of reconstituted tobacco sheets and/or expanded tobacco," and "increase of smoke pH levels by chemical processing and additives" — to increase the nicotine and tar levels delivered to smokers, while at the same time fraudulently marketing those cigarettes as delivering less tar and nicotine than regular cigarettes when actually smoked by consumers. Pet. App. 64a-65a (Am. Compl. ¶ 12(a), (c)); *id.* at 65a (Am. Compl. ¶ 13). That Philip Morris's fraudulent scheme involved, in part, knowingly designing its cigarettes to trick a feature of the FTC's regulatory regime — the Cambridge Filter Method — and then reporting those results (which Philip Morris knew to be misleading) in marketing its light cigarettes does not mean petitioners' claims are "ultimately" a challenge to that regime. PM Br. 1.[3]

Br. 2 (plaintiffs' complaint "challeng[es] PM USA's *marketing* of 'light' cigarettes") (emphasis added); *id.* at 34 ("Plaintiffs' complaint challenges PM USA's *marketing* pursuant to the FTC's policies and directives.") (emphasis added); *id.* at 35 ("the very conduct at issue" in this case is the "alleged deceptive *marketing* of Lights") (emphasis added).

[3] *See, e.g., United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) ("The specific advertisements which the Government claims were intentionally misleading . . . were certainly not mandated by the FTC."); *Paldrmic v. Altria Corporate Servs., Inc.*, 327 F. Supp. 2d 959, 966-67 (E.D. Wis. 2004) (design and manufacture of Marlboro Lights were "acts that most assuredly were not performed under the direct and detailed control of the FTC"); *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 846 (N.D. W. Va. 2004) ("[T]he FTC . . . did not direct [Philip Morris] to 'trick' the testing procedure, and did not require [Philip Morris] to disseminate misleading information.").

Philip Morris cannot evade that conclusion by contending (at 21-22) that the Court must "credit" the company's "theory of the case." Though the removing defendant is entitled to craft its own colorable argument for federal removal, the plaintiff remains "master of [its own] claim," and the defendant is not free to recast the complaint to suit its removal theory. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 394 (1987) (rejecting defendant's claim that plaintiffs' "state-law contract claims [were] *in reality* completely preempted" federal-law claims) (emphasis added). Were it otherwise, any federally regulated entity with a plausible preemption defense could remove to federal court simply by *asserting* that the "core" of the plaintiff's case is a challenge to a federal regulatory regime.[4]

In all events, Philip Morris's attempt to recast petitioners' state-law claims as a challenge to the Cambridge Filter Method is ultimately beside the point. Even if this case were "about" nothing more than the Cambridge Filter Method, Philip Morris would have no right to removal under § 1442(a)(1). In Philip Morris's view of the case, it

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[4] Contrary to Philip Morris's assertion, nothing in *Jefferson County v. Acker*, 527 U.S. 423 (1999), requires this Court to credit Philip Morris's revisionist reading of petitioners' claims. At issue in *Acker* was whether two federal judges could remove to federal court a state-court suit for the collection of a county license tax imposed, in the judges' view, on the performance of their federal judicial duties and therefore in violation of the intergovernmental tax immunity doctrine. Unlike Philip Morris, the judges in *Acker* were self-evidently within the class of federal judicial officers entitled to removal under 28 U.S.C. § 1442(a)(3). *See id.* at 432. The question was whether there was a causal connection between the tax-collection suit and the judges' official action sufficient to establish that the suit was "for any act under color of office" within the meaning of § 1442(a)(3). Because that issue necessarily merged with the merits of the judges' defense, and because all that is required of federal officers for purposes of removal is a "colorable defense," not "an airtight case on the merits," the Court accepted the judges' "theory of the case" on the merits for purposes of its jurisdictional inquiry. *Id.* The alternative would have required the Court "to decide the merits of this case" in order to resolve the removal issue. *Id.* There is no similar reason here to credit Philip Morris's recharacterization of petitioners' claims.

was compelled by regulatory edict to use the Cambridge Filter Method as part of a comprehensive regime governing the marketing and sale of cigarettes. *See* PM Br. 1-10. *But see infra* pp. 18-19. Even if its theory is presumed to be true at this stage in the litigation, that theory merely sets up a preemption defense that its compliance with the strictures of the federal regime precludes state-law claims based on that compliance. *See, e.g., Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392-93 (5th Cir. 2007). But this Court's cases make clear that a preemption defense is not a basis for removal. *See Caterpillar*, 482 U.S. at 393; *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988).

Finally, Philip Morris's claim (at 2, 12, 22) that this Court must accept as true the factual averments in its removal petition is of no practical consequence. Petitioners here challenge not the facts on which Philip Morris relies but the legal conclusions it seeks to draw from those facts. *See* Pet. Br. 44-48. No principle of law requires this Court to accept for purposes of removal the legal conclusions or assumptions embodied in a defendant's removal petition.

B. Compliance With FTC Regulation Is Not An Exercise Of "Delegated Authority"

The federal officer removal statute protects federal officers and agencies in *their enforcement* of the law and official functions. It does not afford a removal right to *regulated entities complying* with federal law. *See* Pet. Br. 23-27. Philip Morris's contrary approach turns the statute's purposes upside down, by giving a right of removal to private commercial actors (like Philip Morris) that are the *objects* of, rather than *participants* in, federal law enforcement. *See id.* at 23-24. Distinguishing between compliance with and enforcement of federal regulation is necessary to avoid a bizarre interpretation of the "acting under" clause that would "convert opponents into virtual agents." *Brentwood Academy v. Tennessee Secondary Sch.*

Athletic Ass'n, 531 U.S. 288, 303-04 (2001); *see* Pet. Br. 24-25.

Philip Morris does not confront these concerns head-on. Instead, it tries to clothe itself in the mantle of law enforcement by depicting its cigarette-testing obligation as a "delegation" of authority from the FTC. Philip Morris's theory is that it conducts testing activities as an agent of the federal government and is therefore entitled to the protections of federal officer removal when it is sued in state court for acts committed in its agency capacity. The suit in this case, of course, challenges Philip Morris's marketing and sale of light cigarettes, not its testing of those cigarettes. But, even if Philip Morris could permissibly recast petitioners' claims as attacks on the cigarette-testing regime, its characterization of its role in that regime as a delegated federal law-enforcement officer, as opposed to simply an object of federal regulation, is both implausible and baseless.

1. *Philip Morris's own factual averments do not establish "delegation" of authority by the FTC.* Crediting Philip Morris's averments in full, the facts are that, in the 1980s, the FTC restructured its regulation of the tobacco industry by compelling tobacco companies, rather than the FTC, to bear the costs of cigarette testing. That restructuring concerned the 1970 voluntary agreement, which, in Philip Morris's view, was the pillar of the FTC's regulation of light cigarettes. *See* PM Br. 8 (arguing that "the FTC has strictly policed [the terms of the 1970 agreement]" to ensure compliance). Specifically, in the 1980s, the 1970 pact was amended to require tobacco-company testing, to allow the FTC access to industry testing facilities, and to "obligat[e]" tobacco companies to use "the 'tar' and nicotine ratings" generated by such testing in the companies' "cigarette advertising." PM C.A. App. 654-57; *see* PM Br. 30 ("the FTC ordered the industry to instead perform the testing (under the FTC's control)"). Despite that shift in FTC policy — from conducting tests itself to requiring the industry to conduct the tests — the testing

requirement (as a condition for marketing and selling light cigarettes and assuming for the sake of argument that there was such a requirement) remained fundamentally an incident of federal regulation.[5]

This case — on Philip Morris's own theory — therefore bears all the hallmarks of an agency imposing regulatory requirements on a regulated entity. Despite more than 20 references to "delegation" and "delegated authority" in its brief, Philip Morris points to no document, rule, policy statement, regulation, or any other *evidence* demonstrating that the FTC in fact delegated (or intended to delegate) its statutory authority to the tobacco industry. In fact, nothing in the public record suggests that the FTC ever contemplated any such delegation of authority. To support its bald assertion, Philip Morris points only to a simple sequence of events: first the agency did the testing of cigarettes; then the agency halted its own testing activities and required the industry to perform the testing. From that bare chronology Philip Morris infers that the FTC necessarily "delegated" its testing authority to the industry. The inference is unwarranted. Philip Morris's "delegation" theory is "entirely a creature of [its] own invention." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785-86 (1991) (rejecting the "strange notion" that 28 U.S.C. § 1362 represents a "delegation" to Indian tribes of federal exemption from state sovereign immunity where nothing in the statute or case law "mention[ed] [the] word" "'delegation'").

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[5] Evidence submitted by Philip Morris, for example, makes clear that the FTC thought it was doing nothing unusual in closing its laboratory and relying on regulation to compel the industry to conduct the testing. William C. MacLeod, then-director of the Bureau of Consumer Protection, responded to congressional concern that the FTC had elected to rely on tobacco companies to test by pointing out that "[i]t is *generally the case* in the regulation of measurements of performance and constituent standards that the Government leaves it to the industry with appropriate checks and balances upon the performance that the industry reports." JA 99 (emphasis added).

The facts alleged by Philip Morris evince none of the ordinary indicia of delegation. Delegation is "[t]he act of entrusting another with *authority* or empowering another to act as an *agent* or representative." *Black's Law Dictionary* 459 (8th ed. 2004) (emphases added). That standard is not remotely met here.

To begin with, Philip Morris did not need the FTC's authorization to test its own products. Indeed, the cigarette companies had long been conducting tar and nicotine testing themselves without any official authorization. *See* PM C.A. App. 689 (during the operation of the FTC laboratory, TITL was testing as well). The tobacco companies' untrustworthiness in performing their own testing and reporting of accurate results had led the FTC to begin its testing program in 1967.[6] That private, commercial testing — which predated the FTC program — was done to advance the tobacco companies' profits, not to promote the FTC's regulatory agenda or the public interest.

Moreover, Philip Morris was not "exercising power possessed by virtue of . . . law" or "clothed with the authority of . . . law" in testing its own cigarettes and providing the FTC with the results. *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (internal quotation marks omitted). The FTC certainly took no formal or informal action expressly endowing the industry with the agency's authority or responsibility. Nor did it empower Philip Morris to act as its agent in testing cigarettes in compliance with

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[6] When it announced the ending of its testing program as a cost-saving measure, the FTC explained in congressional testimony that it viewed market forces (tobacco companies reporting their rivals' dishonest test results), random checks by FTC inspectors of the TITL laboratory, and occasional alternative tests on cigarettes at a different government laboratory to be suitable checks on the cigarette-testing process to ensure accuracy in the reporting of tar and nicotine levels. *See* JA 100-03. The FTC thus sought to obtain the same regulatory effects — true and accurate information about tar and nicotine content — through a different use of government resources. That change in regulatory strategy, however, in no way constituted a "delegation" of authority.

federal regulation. On the contrary, as a regulated commercial actor with interests "characteristically" antagonistic to those of the regulatory agency, *id.* at 318-19, Philip Morris was an "opponent," not a "virtual agent," of the FTC. *Brentwood Academy*, 531 U.S. at 303-04.[7]

2. *Philip Morris's alternative theory of being a "contractor" with the FTC has no merit.* In an alternate formulation, Philip Morris says (at 31) that the FTC "contracted out its testing obligations" to the tobacco companies. But Philip Morris has pointed to no actual contract, and there is none. The FTC never solicited bids for conducting cigarette testing on its behalf, never awarded any contract to perform such testing, and never compensated the tobacco companies for conducting the tests. Yet these are precisely the steps a government agency would be expected to take if it wished to "contract out" a service. *See* 48 C.F.R. Pt. 1 (Federal Acquisition Regulations). Instead, the FTC, exercising its regulatory authority under the FTC Act, compelled tobacco companies to test their products and to disclose those results to the Commission. *See* PM Br. 14 (citing court of appeals' holding that FTC "requires the cigarette manufacturers to conduct the testing"); *see also* 15 U.S.C. § 46(a) (authorizing FTC "[t]o gather and compile information" from regulated entities); *id.* § 46(b) (authorizing FTC to require regulated entities "to file with the Commission . . . annual or special . . . reports"). Even on Philip Morris's testing theory, this case is about an

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[7] It is doubtful that the FTC could lawfully have "delegated authority to test cigarettes" to tobacco companies, as Philip Morris insists it did (at 31). An agency ordinarily may not, absent express congressional authorization, delegate official tasks to outside parties. *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004); *Shook v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 783-84 & n.6 (D.C. Cir. 1998). Philip Morris points to no congressional statute expressly authorizing such a delegation.

agency's exercise of regulatory authority, not a contracting out of services.[8]

3. *Philip Morris's delegation theory finds no support in this Court's cases.* Philip Morris's novel theory of delegation by regulation is foreign to the federal officer removal statute. A clear difference exists between the soldier in *Davis v. South Carolina*, 107 U.S. 597 (1883), and the chauffeur in *Maryland v. Soper*, 270 U.S. 9 (1926), on the one hand, and Philip Morris on the other: the soldier and chauffeur were actively participating in *enforcing* the federal revenue laws, whereas Philip Morris, in conducting its testing activities, is *complying* with regulatory requirements as an *object* of federal regulation. Nothing in the text, history, or purposes of the federal officer removal statute suggests that it was meant to benefit those who merely comply with, as opposed to those who assist in enforcing, federal regulation.

Courts long ago rejected the concept that private actors could remove on the theory that, in complying with federal regulation, they were assisting federal officers. *See Johnson v. Wells, Fargo & Co.*, 98 F. 3, 7-8 (C.C.N.D. Cal.

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[8] The FTC is hardly alone in requiring regulated entities to perform testing. For example, "[b]oth FIFRA and TSCA . . . permit EPA to require the manufacturer or processor of an existing chemical to undertake testing at its own expense covering the entire range of information relevant to [an] unreasonable risk determination." John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 Colum. L. Rev. 261, 312 (1991). The TSCA testing provisions were adopted to avoid burdening the government with the costs of testing. *See* 15 U.S.C. § 2601(b)(1). Private testing, moreover, supplements the EPA's own research and testing of chemicals, undertaken "to avoid the bias that can affect privately produced data." Applegate, 91 Colum. L. Rev. at 306; *see also* Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm*, 89 Geo. L.J. 257, 265 (2001) (noting that, in addition to authority to require manufactures to test new chemicals, "EPA itself screens" chemicals each year). Regulatory regimes that combine public and private testing obligations are not unique to the EPA. *See* Public Citizen Br. 20-22 (discussing FDA, USDA, and NHTSA testing).

1899) (No. 12739) (a regulated common carrier, though subject to federal tariff regulations, was not "acting under" a federal revenue officer when it refused, under the authority of those regulations, to transport a tendered package that lacked a required revenue stamp). Likewise, Philip Morris does not assist in *enforcing* the FTC Act when it merely *complies* with what Philip Morris claims to be FTC-imposed testing obligations; rather, it is a regulated party that, like the carrier in *Wells Fargo*, is simply "brought within the range" of a federal regulatory regime. *Id.*

Philip Morris maintains that, "[a]s an historical matter, PMUSA's delegated responsibility for testing . . . is no different from a private individual's delegated responsibility to examine imported goods to determine whether they had been shipped from England in violation of the Customs Act of 1815." PM Br. 30. But that claim fails to account for the essential difference between regulated entities (which comply with federal law) and federal officers and their agents (who enforce federal law). Under Philip Morris's rendition of the statute, shippers obliged to comply with the Custom Act of 1815 would as a class have been entitled to removal. Yet that notion has no basis in the historical purpose of the statute, which was to safeguard those charged with *enforcing* unpopular federal laws *against* regulated entities from harassing suits brought *by* those regulated entities. *See* Pet. Br. 17-18. Philip Morris cites no evidence that Congress intended to extend a benefit of removal to the regulated entities themselves.

Nor does such a view make historical sense: the animus directed at those enforcing federal law would not logically be directed at regulated entities complying with federal regulation. *See id.* at 18. Indeed, it is telling that Philip Morris makes no serious effort to explain how regional animus against enforcement of the FTC Act could be

directed against it, such that it needs the protection of a federal forum.[9]

4. *Philip Morris's novel limiting principle is self-serving and wrong.* Recognizing the breadth of the Eighth Circuit's comprehensive-control test, Philip Morris proposes a limitation that, it posits, only tobacco companies can meet: its delegated-authority theory applies, Philip Morris says, only because "the government itself *previously* performed . . . the testing." PM Br. 43 (emphasis added). Regardless of whether such a limitation would restrict removal by regulated entities in other industries, the historical sequence of testing activities does not transform this case from one of regulatory compliance into one of delegated authority.[10] The essential relationship between Philip Morris and the FTC remains that of regulating agency and regulated entity — a relationship that is manifestly insufficient to support federal officer removal. *See supra* pp. 10-11.

Beyond those problems, Philip Morris's proposed standard would lead to absurd results. It would mean, for example, that, if the FTC had opened its laboratory *after* it had imposed a testing requirement on tobacco companies, Philip Morris would lack a basis for removal, even though the relevant conduct — Philip Morris's testing, marketing, and sale of light cigarettes — would have been the *same* regardless of the timeline. It would also mean that a federal agency with a history of public testing — such as

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[9] Philip Morris properly concedes (at 46) that it cannot claim the protections of official immunity. Because a core purpose of the federal officer removal statute is to afford a federal forum for resolution of immunity defenses, *see Willingham v. Morgan*, 395 U.S. 402, 407 (1969); *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 86-87 (1991), Philip Morris's conceded inability to invoke that defense reinforces the conclusion that it is not within the class entitled to removal.

[10] Philip Morris's historical characterization is also wrong: tobacco companies did not start testing *after* the FTC closed its laboratory; they had been doing their own testing all along. *See* PM C.A. App. 689.

the EPA — would extend a right of federal officer removal to any entity on which it subsequently imposed testing requirements.

In addition, making dispositive the fact that the FTC itself tested cigarettes would result in the perverse outcome that an industry uniquely *distrusted* by a federal agency would have a claim to federal officer removal precisely because of that distrust. The FTC opened its own laboratory because it considered it "highly undesirable to allow cigarette manufacturers to use tar and nicotine data in advertising obtained from the manufacturers' own laboratories." JA 153-54; *see also Strengthening the Cigarette Labeling Act*, 112 Cong. Rec. 17270, 17274 (1966) (quoting letter from FTC chairman expressing concern "that the manufacturers will publish misleading figures" and recommending that "products be tested by a central laboratory"). The FTC concluded "that the past record of cigarette manufacturers in matters related to false and misleading advertising makes reliance on their good faith alone . . . highly inadvisable." JA 156. Because the FTC tested cigarettes out of a distrust of tobacco companies before imposing the testing obligation on the regulated entities themselves, Philip Morris views itself as entitled to a statutory benefit not available to *any other* regulated industry. *See* PM Br. 43. This Court should reject an interpretation of the statute that produces such a bizarre outcome. *Cf. Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454 (1989) (rejecting reading of statute that would "compel an odd result") (internal quotation marks omitted).

II. PHILIP MORRIS'S DEFENSE OF THE EIGHTH CIRCUIT'S TEST IS UNAVAILING

The federal officer removal statute protects private parties only when they are sued for acts committed while aiding or assisting federal officers in the performance of their official duties. *See City of Greenwood v. Peacock*, 384 U.S. 808 (1966); *Maryland v. Soper*, *supra*; *Davis v. South Carolina*, *supra*. Contrary to the Eighth Circuit's

approach, the statute does not extend a right of removal to private commercial actors on the basis of their compliance with "comprehensive and detailed" federal regulation.

Philip Morris offers only a half-hearted defense (at 33-36) of the Eighth Circuit's comprehensive-control test. *First*, Philip Morris claims that this Court has never defined the "outer bounds" of the "acting under" clause: "Although the Court's precedents indicate that aiding or assisting a federal officer is *sufficient* to satisfy the 'acting under' standard, they do not establish that the provision of aid or assistance is *necessary* to meet that requirement." *Id.* at 33. But Philip Morris overlooks *Peacock*, in which this Court held that removal under 28 U.S.C. § 1443(2) is limited to instances in which a private actor is "authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law." 384 U.S. at 824; *see* Pet. Br. 22-23; U.S. Br. 11-16. The Court's analysis in *Peacock* applies with added force to § 1442(a)(1). If the civil-rights removal statute's *implicit* "acting under" clause restricts private-party removal to those who aid or assist a federal officer, the federal officer removal statute's *explicit* "acting under" clause surely embodies the same restriction. That conclusion is reinforced by the *Peacock* Court's reliance on the history of the federal officer removal statute, in which it found ample support for an "aiding or assisting" restriction on removal by private parties. *See* 384 U.S. at 820 n.17.

Second, Philip Morris asserts, relying on a snippet of language drawn out of context from *Tennessee v. Davis*, 100 U.S. 257 (1880), that removal is proper whenever "a private party acts at the direction of a federal officer." PM Br. 33-34. In *Tennessee v. Davis*, this Court upheld the constitutionality of the removal statute as applied to a federal officer engaged in the discharge of his law-enforcement duties as a deputy collector of internal revenue. *See* 100 U.S. at 260-63; *id.* at 263 (discussing interest in protecting federal "officers and agents"). Philip

Morris claims that the decision points to a ground for removal in *any* case in which a *private party* claims to have acted "under the immediate direction of the national government, and in obedience to its laws." PM Br. 33 (internal quotation marks and emphases omitted). That assertion grossly misapprehends this Court's holding and ascribes a historically inaccurate purpose to the statute. It confuses the role of federal officer removal — which is limited to federal officers and those assisting them in enforcing federal law — and the defense of preemption — which is more broadly available to private regulated parties based on compliance with federal directives. *See* Pet. Br. 17-18, 30-31.

Third, Philip Morris tries to put a more favorable spin (at 34) on the definitions of "acting under" cited by petitioners and the United States. But those definitions confirm what is clear from the adjoining "color of . . . office" clause and the lineage of the statute — namely, that a private party acts *under* a federal officer in assisting the officer as subordinate in performing official duties. *See, e.g.*, *Black's Law Dictionary* 1695 (4th ed. 1968) ("under" is "[s]ometimes used in its literal sense of below in position, beneath, but more frequently in its secondary meaning of 'inferior' or 'subordinate'"). A contrary reading of "under," which would significantly expand federal jurisdiction by affording a right of removal to private entities merely because they are subject to federal regulation, is inconsistent with settled canons of interpretation. *See* Pet. Br. 27 & n.9; *see also Gonzalez v. Oregon*, 126 S. Ct. 904, 925 (2006) ("[B]ackground principles of our federal system . . . belie the notion that Congress would use . . . an obscure grant of authority to regulate areas traditionally supervised by the States' police power.").

Fourth, Philip Morris seeks support for a comprehensive-control test in the legislative history of the 1996 amendment to § 1442(a)(1): a reference to "preemption" in a House report, says Philip Morris (at 36), is "clear indication that Section 1442(a)(1) extends to private persons

subject to federal regulation." The text of that House report, however, makes clear that Congress's concern was with the removal right of federal agencies, not private regulated commercial actors: "The result of these decisions has been that *federal agencies* have had to defend themselves in state court, despite important and complex federal issues such as preemption and sovereign immunity." H.R. Rep. No. 104-798, at 20 (1996) (emphasis added). The notion that Congress must have been referring to private actors because federal agencies do not invoke preemption defenses is wrong: first, the quoted sentence specifically refers to "federal agencies," not to private parties; second, the idea that a federal officer or agency would invoke the supremacy of federal law as a defense against application of state law is hardly novel.[11]

Fifth, Philip Morris analogizes (at 38) to cases involving government contractors. But the fact that some courts have allowed government contractors to remove under § 1442(a)(1) says nothing about whether a private actor that lacks a contractual relationship with the government and is merely an object of federal regulation may do the same. Those courts have reasoned that a government contractor may be deemed a *de facto* federal *employee* in certain circumstances and may have a ground for removal when sued for acts performed in that role and under the government's control and supervision. *See* Pet. Br. 32-33.[12] That analysis, if sound, might in some

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[11] *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426-28 (1819); Laurence H. Tribe, *American Constitutional Law* § 6-30, at 511 (2d ed. 1988) ("state attempts to regulate or tax entities with some special link to the federal government" raise issues of "federal preemption").

[12] Philip Morris indefensibly imputes to petitioners, by means of a cropped quotation, a view that petitioners plainly were ascribing to those courts that have allowed removal by government contractors. Philip Morris says the following, quoting from our opening brief: "According to petitioners, removal is appropriate where 'federal control and oversight . . . is substantial and the tasks being performed are those that the government might otherwise perform itself.'" PM Br. 26. This is what the sentence actually said (with the omitted portion

circumstances be reconciled with the text, history, and purposes of the statute. *See id.* at 33; *see also* H.R. Rep. No. 80-308, at A134 (1947). But Philip Morris cannot sensibly be thought of as a *de facto* employee of the federal government based on its compliance with regulatory obligations. Philip Morris is not on the government's payroll, is not exercising governmental authority, and can point to no contract from which a government-contractor defense might arise. Rather, Philip Morris is doing no more than complying with regulatory duties for the purpose of participating in commercial activity — namely, the marketing and selling of light cigarettes. The government-contractor cases therefore offer no support for Philip Morris's removal theory.

III. PHILIP MORRIS IS NOT SUBJECT TO COMPREHENSIVE AND DETAILED CONTROL

Petitioners and their *amici* have shown that Philip Morris is not entitled to removal even under a comprehensive-and-detailed-control test. *See* Pet. Br. 39-48; U.S. Br. 2-5, 20-21; Public Citizen Br. 17-20; Campaign for Tobacco-Free Kids Br. 20-25.

At the threshold, Philip Morris responds that "petitioners . . . disregard the averments in PMUSA's Notice of Removal, which . . . are controlling for purposes of this Court's jurisdictional analysis." PM Br. 38. But petitioners do not quarrel here with the *facts* — *e.g.*, whether the FTC adopted a consent order with American Brands in 1971. They dispute only the *legal* conclusions that Philip Morris seeks to draw from those facts — *e.g.*, whether a

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italicized): "*Those [government-contractor] decisions rest on the view that a government contractor may be deemed an employee of the federal government when* federal control and oversight of the contractor is substantial and the tasks being performed are those that the government might otherwise perform itself." Pet. Br. 32-33. To be clear, petitioners acknowledge but do not here endorse the lower court decisions permitting federal officer removal by government contractors. Nor need this Court reach the question in this case, because Philip Morris cannot legitimately claim the status of a government contractor.

consent order has the effect of regulating on an industry-wide basis. This Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

Three points establish that the FTC's regulation of light cigarettes is anything but comprehensive. *First*, Philip Morris does not dispute that, although the FTC has broad authority to adopt trade regulation rules, it has never promulgated a single rule governing cigarettes. *See* 16 C.F.R. Pt. 408; Pet. Br. 39-40. And, as *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985), established, the FTC was not even authorized to require the Cambridge Filter Method. At best, Philip Morris has shown that the FTC adopted an informal policy of not pursuing enforcement actions against companies that make tar and nicotine disclosures. If *that* is the standard for "comprehensive" regulation, then it is hard to imagine a federally regulated entity that would *not* be entitled to remove under the federal officer removal statute. *See* Pet. Br. 34-36.

In response, Philip Morris takes issue (at 39 n.11) with petitioners' reading of *Brown & Williamson*. But the D.C. Circuit was clear that it did not want to "enshrine the current FTC system as the sole legitimate testing method" because "it was not passed [as a trade regulation rule] pursuant to section 18 of the FTC Act." 778 F.2d at 45. And Philip Morris's record evidence is to the same effect: "In the litigation that arose from the Barclay cigarette issue of a few years ago . . . [t]he answer that the courts gave was [the FTC] cannot force a company to use nor can [the FTC] approve in advance the kind of testing a company uses." PM C.A. App. 329.

Second, the FTC itself has determined that there are no regulatory definitions of "light" and "low tar," thereby undermining important parts of respondents' claims. *See* Notice, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. 48,158, 48,163 (1997); Pet. Br. 40-41. Philip Morris makes no attempt to reconcile its position here

that it is comprehensively regulated in its use of "light" descriptors with the position it took in 1998 that there was no need even for "official" regulatory "guidance" as to those same descriptors. Comments of Philip Morris Inc., *et al.*, at 94, *On the Proposal Entitled FTC Cigarette Testing Methodology*, FTC File No. P944509 (filed Feb. 5, 1998).

Third, as demonstrated in our opening brief, the FTC's consent orders with parties *other* than Philip Morris are not signs of comprehensive industry-wide regulation. *See* Pet. Br. 44-48. In response, Philip Morris insists (at 41) that "courts have repeatedly recognized that FTC consent orders have regulatory effects that extend well beyond the parties to the agreement." None of its cited cases, however, supports the claim that consent orders serve as industry-wide regulation. Settled precedent establishes, to the contrary, that FTC consent orders are *not* a vehicle for establishing industry-wide policy. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 330 n.12 (1961) ("the circumstances surrounding such negotiated [consent] agreements are so different that they cannot be persuasively cited in a litigation context"); *Trans Union Corp. v. FTC*, 245 F.3d 809, 816-17 (affirming FTC decision that previous consent order had no "precedential effect" on subsequent order and did not entitle regulated party to the same negotiated bargain), *on denial of reh'g*, 267 F.3d 1138 (D.C. Cir. 2001); *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 312 (7th Cir. 1976) (previous consent order does not establish "controlling precedent for later Commission action").[13]

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[13] *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 391 (1959), does not, as Philip Morris's *amici* contend, point to a different result. *See* Former FTC Staff Br. 24. The Court there found support for its interpretation of the Fur Products Labeling Act in the FTC's "consistent administrative construction" of the Act, exemplified by *In re Ed Hamilton Furs, Inc.*, 51 F.T.C. 186 (1954), and reinforced by more than a hundred subsequent cease-and-desist orders based on that case. 359 U.S. at 391 & n.6. Although styled a "Stipulation for Consent Order," the order ending the *Ed Hamilton Furs* proceeding was itself, in substance,

Philip Morris also quotes (at 41-42) the congressional testimony of a former FTC chairman explaining that the agency may choose to proceed by adjudication rather than by rulemaking because adjudication is often more efficient. But no one disputes that adjudicatory orders may have precedential effect in prescribing permissible conduct by regulated parties. The question is whether FTC *consent* orders, which cut short the adjudicatory process and which consequently embody no findings of fact or generally applicable conclusions of law, can nevertheless serve as the foundation of the agency's comprehensive regulation of an industry. Nothing in the testimony or any case on which Philip Morris relies supports the conclusion erroneously reached by the Eighth Circuit (Pet. App. 15a) that consent orders can have any such effect.

Finally, Philip Morris points (at 40) to a 1967 FTC policy statement purportedly authorizing the tobacco industry to make representations about the tar and nicotine content of cigarettes if substantiated by proper testing. But Philip Morris cites no authority for its premise that a policy statement has the force of a trade regulation (it does not, *see* Campaign for Tobacco-Free Kids Br. 7 n.2), let alone that it may form the basis for a comprehensive regulatory regime.

CONCLUSION

The judgment of the court of appeals should be reversed.

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a cease-and-desist order. The defendant stipulated to the record, withdrew its answer to the FTC's complaint, and, most importantly, "agree[d] that the order . . . shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon." 51 F.T.C. at 193-94. That language does not appear in the 1971 and 1995 consent orders on which Philip Morris here relies.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., AND PHILIP MORRIS INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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16 C.F.R. § 1.1 5

16 C.F.R. § 1.3 5

16 C.F.R. § 2.34 6

ARGUMENT

Respondent submits this supplemental brief pursuant to Supreme Court Rule 15 in response to the submission filed by the Solicitor General. *See* Brief For The United States As Amicus Curiae ("SG Br.") (Dec. 15, 2006). Respondent agrees with the Solicitor General's assessment that this case "does not merit this Court's review." *Id.* at 1. In particular, respondent agrees with the Solicitor General that the supposed "conflict" relied upon by petitioners in support of review does not exist, and that the issue is sufficiently "fact-specific" that review would be inappropriate. *Id.* at 12-15.

Respondent writes to address certain statements made by the Solicitor General concerning the Federal Trade Commission's ("FTC") regulatory history with respect to tar and nicotine measurements, disclosures, and marketing that go beyond, and are contradicted by, the factual record in this case. As an initial matter, we note that the Department of Justice is hardly a disinterested party in this matter. The Department of Justice is currently involved in litigation against respondent, in which one of the central issues is the FTC's regulatory history with respect to low yield cigarettes. *See United States v. Philip Morris USA Inc.*, No. 99-2496, 449 F. Supp. 2d 1, 2006 WL 2380650, at *222 (D.D.C. 2006) (enjoining use of lights descriptors), *appeal docketed* No. 06-5267 (D.C. Cir. Sept. 11, 2006) (stay granted pending appeal).

In any event, the Solicitor General has made a number of statements regarding the FTC's regulatory history that should be corrected. Those statements, as set forth below, are contradicted by the FTC's own statements and documents found in this record and the decisions of other courts considering the FTC's comprehensive low tar regulatory

program.[1] These corrections further demonstrate that the Eighth Circuit -- after conducting a careful examination of the FTC's regulatory history -- did not err in its factual determinations or in its legal conclusion that federal officer removal was proper. For example:

1. *Definition of low tar.* The Solicitor General argues that the FTC has never defined the term "low tar." SG Br. at 4. The record in this case is to the contrary. The FTC repeatedly has "formally" defined "low tar" in terms of the FTC Method. *See* DA-582 ("[t]he FTC formally defines a low 'tar' cigarette as one that has 15.0 or less milligrams of 'tar'" according to the FTC Method); *see also* DA-0538 (1979 FTC Report to Congress); DA-0542 (1980 FTC Report to Congress); *Price*, 848 N.E.2d at 14, 50 (recognizing that the FTC defined "low tar" in reference to the FTC Method). Indeed, the FTC annually has reported to Congress every year on the market share of "low yield cigarettes" -- *i.e.*, "those having 15 mg. of 'tar' or less." *See, e.g.*, DA-538 (1979 FTC Report to Congress).

The Solicitor General addresses only one of these documents: the 1979 FTC Report to Congress. *See* DA-538. The Solicitor General asserts that, in this report, the FTC "assured Congress that it had never formally defined 'ultra-

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[1] *See, e.g., Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 49 (Ill. 2005) (the FTC "specifically authorized" use of the "lights" descriptor); *Flanagan v. Altria Group, Inc.*, No. 05-71697, 2005 WL 2769010, at *2, 7 (E.D. Mich. Oct. 25, 2005) (use of descriptors was "specifically authorized" by the FTC); *Sullivan v. Philip Morris USA Inc.*, No. 03-796, 2005 WL 2123702, at *9 (W.D. La. Aug. 31, 2005) (respondent "complied with § 5(a)(1)" of the FTC Act when using descriptors), *appeal granted on other grounds*, Nos. 06-1, 06-30311 (5th Cir. Mar. 27, 2006); *Good v. Altria Group, Inc.*, 436 F. Supp. 2d 132, 138 (D. Me. 2006) (the FTC has determined that "descriptors are not forbidden and are not unfair or deceptive (at least if not unsubstantiated)"); *but see United States*, 2006 WL 2380650, at *222 n.88 (rejecting preemption argument).

low tar', or any term related to 'tar' level." SG Br. at 4; *see also id.* at 11. In fact, in that report, the FTC actually told Congress that: "the FTC has not defined 'ultra-low tar,' or any term related to 'tar' level ***except for 'low tar,' which the FTC defines as 15.0 mg or less tar.***" DA-538 n.11 (emphasis added). Thus, as illustrated by the very report cited by the Solicitor General, the FTC specifically authorized the descriptor "low tar" by defining it in terms of the FTC Method that it developed and directed Philip Morris USA (PM USA) to use.

2. *FTC Regulatory Activities.* The Solicitor General states that the FTC exercises its regulatory authority "in two ways": by "bring[ing] an administrative or judicial enforcement action," and by "promulgat[ing] trade regulation rules." SG Br. at 3. The Solicitor General's assertion is contradicted by the evidence and testimony in the record that the FTC establishes regulatory policies in a number of other ways as well. For example, Lee Peeler, a spokesman chosen by the FTC to speak for the agency,[2] testified that the FTC frequently uses "voluntary agreements" to provide guidance and direction as to the FTC's policies with regard to deceptive advertising. DA-692. Mr. Peeler also explained that the FTC relies upon enforcement actions brought against a single company to provide guidance and direction to the entire industry as to what conduct the FTC does and does not permit. *See* DA-702; PA-94. In addition, Mr. Peeler noted that the FTC uses Advisory Opinions to provide industry guidance. DA-703. Furthermore, as Daniel Oliver, then-Chairman of the FTC, explained to a Congressional subcommittee, the FTC has found these informal means of

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[2] At the time of his testimony, Mr. Peeler was the Deputy Director of the FTC's Bureau of Consumer Protection and had been employed at the FTC for over 30 years. DA-673-74. The deposition cited herein was a Federal Rule of Civil Procedure 30(b)(6) deposition in which Mr. Peeler was designated by the FTC to speak on its behalf. *See* DA-673-674.

regulation to be more efficient than traditional rulemaking, especially with respect to the tobacco industry. DA-341; *see also* DA-338-340; DA-446-449; DA-432-433.

3. *1970 Agreement.* The Solicitor General also errs in characterizing the 1970 agreement -- in which PM USA agreed to disclose FTC-measured tar and nicotine yields in all cigarette advertising -- as a "private agreement" not involving the FTC. SG Br. at 4. This error, in turn, leads the Solicitor General to conclude that the FTC never required PM USA "to report the results of [FTC] tests in its advertising." *Id.* at 9. To the contrary, the FTC urged the tobacco industry to reach an agreement requiring tar and nicotine yield disclosures in lieu of formal rulemaking that the FTC had proposed. *See* DA-525-26. The FTC *rejected* the first agreement proposed by the tobacco industry, requiring a number of changes. *See* DA-456-63; DA-464. The FTC voted to accept the agreement and withdrew its proposed rulemaking only after the industry changed the agreement to the FTC's exact requirements. *See* DA-521-22.[3] When accepting the agreement, the FTC warned that it would initiate rulemaking once again if the agreement was not effective in compelling tar and nicotine yield disclosures. *See* DA-451-52. Thus, although the FTC did not require the disclosure of FTC Method results by a formal rule, the FTC's actions in this regard clearly amount to informal regulation of tar and nicotine disclosures, as the Eighth Circuit correctly held.

4. *The FTC's Mandated Measurement Method.* The Solicitor General mistakenly contends that the FTC never mandated the use of the FTC Method for measuring tar and nicotine yields. SG Br. at 9. To the contrary, the FTC repeatedly explained that the *only* tar and nicotine statements that could appear in advertising were "factual statement[s] of the tar and nicotine content (expressed in milligrams)" based

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[3] Prior to voting, the FTC placed the proposal on the public record for comment, and received comments. DA-451-52.

on "tests conducted in accordance with the [FTC] Method." DA-037; *see also* DA-295 ("[U]se of more than one testing method . . . would only serve to confuse or mislead the public."); DA-299 ("statements or representations" of tar yields "based on non-standardized tests having no official or governmental sanction would tend to confuse and mislead the public"). In fact, the FTC even declared in an Advisory Opinion -- which is binding on the FTC, 16 C.F.R. §§ 1.1, 1.3 -- that it "would be deceptive to advertise a tar figure which is higher than the latest applicable FTC tar figure." DA-527-529; *see also* 42 Fed. Reg. 21,155 (Apr. 11, 1977) (rejecting request to test cigarettes using different parameters than the FTC Method).

In the face of these repeated statements by the FTC, the Solicitor General mistakenly relies on a passage in *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985), contending that it shows that the FTC could not mandate its test without a formal Trade Regulation Rule. SG Br. at 10. In the cited passage, however, the D.C. Circuit merely concluded that because the FTC had acted through means other than a Trade Regulation Rule in establishing the FTC Method, in any litigation brought to enforce its directives with respect to the test method the FTC would have to proceed via a Section 5 action (rather than suing directly for a violation of a Trade Regulation Rule) and retained the burden of proof regarding deception or unfairness in any such proceeding. 778 F.2d at 44-45; *see also Watson v. Philip Morris, Inc.*, No. 4:03-CV-519, 2003 WL 23272484, at *19 (E.D. Ark. Dec. 12, 2003).

5. *Delegation Of Testing.* The Solicitor General states that "[a]fter the FTC ceased conducting the tests in 1987, the TITL [Tobacco Institute Testing Lab] continued to conduct them." SG Br. at 4. The TITL did not merely decide to continue with the FTC's tests on its own. Instead, the FTC expressly delegated the testing function to the TITL. In fact,

the FTC uses compulsory process to require the tobacco companies to submit the TITL's measurements to the FTC in sworn statements under penalty of perjury, and retains the right to conduct unlimited inspections of the TITL's measurement labs. *See* DA-690 (the FTC obtained FTC Method results by "compulsory process"; the "[FTC] would send 6B requests which were orders to . . . the cigarette manufacturers and they would provide us with the results of the . . . testing"; "the responses to 6Bs are sworn"); DA-320 (compulsory process used to obtain test results according to "the Commission's approved methodology"); DA-291-92 (FTC uses compulsory process to obtain FTC Method results from manufacturers); DA-322-46.

6. *1971 American Brands Consent Decree.* The Solicitor General states that a consent decree "binds only the parties to that decree." SG Br. at 11. Yet the evidence in the record establishes that the FTC uses consent decrees to establish its regulatory policies for an entire industry -- *i.e.*, in what circumstances will the FTC bring a Section 5 action to address conduct that it deems deceptive. *See, e.g.*, DA-341 (FTC Chairman testifying that "[i]n the case of the cigarette industry . . . it is entirely reasonable to suppose that one action against one cigarette company would have an effect on all of them, and that you would not have to make a rule."); *see also Price*, 848 N.E.2d at 53-54 ("[A] consent order entered into by the FTC with one member of a regulated industry, which is published pursuant to statute, provides implied authority for other members of the regulated industry to engage in the same conduct."). For this reason, the FTC publishes all proposed consent decrees (as it did for this one) first for notice and comment. *See, e.g.*, 36 Fed. Reg. 18,515 (Sept. 16, 1971); 59 Fed. Reg. 51,980 (Oct. 13, 1994); 16 C.F.R. § 2.34. And the FTC is generally prohibited from treating identically situated parties differently in consent decrees. *See, e.g., Ford Motor Co. v. FTC*, 547 F.2d 954, 959-61 (6th Cir. 1976) (the FTC must afford the same

treatment to one competitor that it has allowed to another competitor in an earlier consent decree); *Airmark Corp. v. FAA*, 758 F.2d 685, 692, 695 (D.C. Cir. 1985) (vacating agency's orders because the agency's treatment of different entities was "grossly inconsistent and patently arbitrary").

7. *FTC's Encouragement Of Descriptors.* The Solicitor General states that the FTC never "requested nor required" the use of descriptors. SG Br. at 9. Although it is true that the FTC never "required" the use of descriptors, the FTC clearly articulated a policy to encourage manufacturers to compete on the basis of reductions in FTC-measured tar and nicotine yields. *See, e.g.*, DA-033 (FTC wanted to "augment information available to the public on the tar and nicotine content of cigarettes"); DA-299 (stating that the FTC's "current enforcement policy in regard to statements of, and representations relating to, tar and nicotine content of cigarettes" was to "not challenge such statements or representations where they are shown to be accurate and fully substantiated by" the FTC Method).

8. *PM USA Petition To The FTC.* The Solicitor General presents an incomplete description of PM USA's 2002 petition to the FTC -- which was not in the record below. SG Br. at 5. In that petition, PM USA acknowledged that the FTC currently "require[s] the use of the [FTC] Method" for measuring tar and nicotine yields and "allow[s] the use of descriptors." Petition at 6, 13. PM USA merely asked the FTC to consider whether it should change its regulatory regime in light of new scientific developments. Petition at 5.

Once these factual errors are corrected, the Solicitor General's assertion that the FTC never "exercised comprehensive control" with respect to tar and nicotine measurements, disclosures, and marketing is palpably incorrect. SG Br. at 7. As the Eighth Circuit properly recognized, the FTC controlled how tar and nicotine yields should be measured and what manufacturers could say about

those measurements. In fact, as discussed above, the FTC even specifically delegated testing responsibilities to the tobacco industry, thereby satisfying even the standard for federal officer removal proposed by the Solicitor General. *See supra* at 5-6.

CONCLUSION

For these reasons, as well as the reasons set forth in respondent's opposition, this Court should deny review.

Respectfully submitted,

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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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The Solicitor General agrees with petitioners that the Eighth Circuit's legal standard for federal officer removal is fundamentally flawed and that the court's application of its erroneous standard to the facts of this case is "clearly incorrect." SG Br. 8. The Solicitor General nevertheless recommends against certiorari because, in his view, the Eighth Circuit's unsound interpretation of 28 U.S.C. § 1442(a) does not squarely conflict with the legal standard adopted by any other circuit and because a single judge's separate concurring opinion below makes it more difficult to assess the full extent of the decision's adverse practical implications.

The Solicitor General's reservations should not deter the Court from granting plenary review. First, the Solicitor General acknowledges that the First, Seventh, and Eleventh Circuits have applied standards for federal officer removal that are markedly different from – and more demanding than – the Eighth Circuit's "comprehensive control" test. That those courts articulated their standards in cases *upholding* rather than *rejecting* removal on the facts before them does not diminish the clear circuit split. If this case had arisen in any of those other circuits, the outcome would almost certainly have been different.

Second, there is little to be gained and much to be lost by denying review pending further development of the law in the lower courts. The existing disarray in the courts of appeals and among the district courts on this recurring legal issue is already both mature and pervasive, and this Court's guidance is urgently needed to ensure uniform administration of the federal officer removal statute. The Solicitor General's preference for deferring review until the existing splits harden even further would impose needless continuing litigation burdens on private parties and on federal district courts and would significantly impair the ability of the States to enforce consumer-protection laws in state courts.

A. The Solicitor General Agrees That The Eighth Circuit's Legal Test Is Flawed And That Philip Morris Is Not Entitled To Removal

1. Petitioners argue that the Eighth Circuit's expansive interpretation of 28 U.S.C. § 1442(a)(1) – which authorizes removal by a "person acting under [a federal] officer" – is inconsistent with the text, history, and purpose of the provision, and that "[a] private regulated corporation doing no more than abiding by federal regulation cannot avail itself of the protection of the federal officer removal statute." Pet. 25.

The Solicitor General reaches precisely the same conclusion: in his view, "a private party's mere compliance with federal regulatory requirements, no matter how pervasive, does not make removal appropriate under the federal officer provision." SG Br. 18. "Pervasive regulation," the Solicitor General explains, "may give rise to a preemption *defense*, but absent the rare circumstances of complete preemption, that is no basis for removal." *Id.*; *see* Pet. 24-25. Rather, removal is appropriate when a private party "act[s] on behalf of a federal officer or otherwise assist[s] a federal officer in carrying out that officer's duties." SG Br. 18. That standard "would not . . . remotely encompass tobacco manufacturers," such as Philip Morris, "that market 'light' cigarettes, because in so doing the tobacco companies are not acting on behalf of federal officers or otherwise assisting federal officers in carrying out their duties." *Id.* at 18-19.

2. The Solicitor General's proposed test is consistent with our understanding (*see* Pet. 19-20) of *City of Greenwood v. Peacock*, 384 U.S. 808 (1966). In construing the civil rights removal provision of § 1443(2), which authorizes removal "[f]or any act under color of authority derived from any law providing for equal rights," the Court determined, by analogy to the predecessor of § 1442(a)(1), that private parties may remove an action only when they assist or act with or for federal officials in "affirmatively executing duties under . . . federal law." *Id.* at 824.

The Solicitor General may well be correct that the current version of § 1442(a)(1) authorizes removal by private parties assisting federal officers in performing any duty, not just those connected to law enforcement. *See* SG Br. 17-18. But that means only that the government's proposed test is slightly broader than the factual circumstances in *Peacock*. The key feature of the Solicitor General's suggested test is that a private party may be "acting under" a federal officer only when it "act[s] on behalf of, or otherwise assist[s], [a] federal officer." *Id.* at 18. That formulation is entirely consistent with what *Peacock* said about the history of the federal officer removal statute.[1] It is likewise consistent with our own view of the governing standard.[2]

B. The Solicitor General Underestimates The Conflict Among And Disarray In The Federal Courts

Although agreeing that the Eighth Circuit's legal standard is "flawed" (at 18) and that the court of appeals "seriously erred" in applying even its own (incorrect) legal standard to the "historical record" (at 8), the Solicitor General recommends against this Court's review in part because "there is no present conflict in the circuits on the proper legal standard for determining when a private party is acting under a federal officer" (at 19-20). That appraisal, however, is unduly formalistic.

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[1] *See Peacock*, 384 U.S. at 820 n.17, 823 n.20 (noting that Customs Act of 1815 protected private parties who "aid[ed] or assist[ed]" the revenue officer and describing the lineage between the "acting under" clause of the federal revenue officer statute, which became the general federal officer removal statute, and the "other person" provision of the Customs Act).

[2] Although the petition (at 20) characterizes *Peacock* as establishing that removal by a private party is appropriate only when that party assists a federal officer in enforcing federal law, that characterization was descriptive, not prescriptive – the duties at issue in *Peacock* were enforcement-related. The Solicitor General's proposal of a broader standard that would encompass duties other than law enforcement hardly supports the conclusion that petitioners and the Solicitor General advocate a different legal test. *See* SG Br. 20.

Three circuits – the First, Seventh, and Eleventh – have applied the federal officer removal statute in a manner fundamentally different from that of the Eighth Circuit. *See* Pet. 9-17; Reply 1-5. The Solicitor General does not dispute that those circuits apply a more stringent legal standard. *See* SG Br. 12-13. In his view, however, the decisions say only that "carrying out an official government function is a *sufficient* basis for removal," not that it is "a *necessary* condition" for removal. *Id.* at 14. True, those decisions uphold rather than reject removal and therefore do not technically exclude the Eighth Circuit's "comprehensive control" test. But any notion that the decisions can be aligned with the Eighth Circuit's holding below is dispelled once one looks past that thin formality.

The key point is that the First, Seventh, and Eleventh Circuits began and ended their analysis of the "acting under" clause with whether the removing party engaged in or assisted a federal officer in performing official governmental functions. The First Circuit explained that a private party may seek removal under § 1442(a)(1) when it acts "strictly and solely at federal behest" in carrying out "official government business." *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989). The Seventh Circuit held that a private party was entitled to removal because he was "participating in a federal investigation and acted under the instructions of federal agents." *Venezia v. Robinson*, 16 F.3d 209, 211 (7th Cir. 1994).[3] And the Eleventh Circuit held that removal was proper because the defendant was "an authorized agent of the FAA" to whom the FAA had "delegate[d]" "powers and duties" of the government. *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1428 (11th Cir. 1996).

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[3] Lower federal courts have read *Venezia* as endorsing an official-function test. *See, e.g., Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838, 846 (S.D. Ill. 2006) (under *Venezia*, "to establish federal officer jurisdiction, a removing defendant must show that it effectively stands in the shoes of a federal employee").

In the Eighth Circuit, by contrast, it is irrelevant whether a removing party is acting for or otherwise assisting a federal officer in carrying out an official duty. Removal instead depends solely on "the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." Pet. App. 6a.

Those different legal frameworks will predictably yield conflicting outcomes, for there are many circumstances – this case is just one example – in which a party is subject to comprehensive control through federal regulation but is not assisting a federal officer in carrying out an official duty. That the First, Seventh, and Eleventh Circuits have not yet had occasion to apply their more rigorous standards to *deny* removal is not surprising: at least until the Eighth Circuit's decision muddied the waters, the district courts and the litigants in those circuits had understood that, under the prevailing precedent, a private party could not remove a case on the theory that its actions were subject to federal regulatory control.

The divide among the federal district courts – an issue that the Solicitor General altogether overlooks – exacerbates the problem. As the petition establishes (at 12-13), those courts themselves sharply disagree on whether, to invoke § 1442(a)(1), a private party must show that its conduct is of an official or quasi-official character.[4] Even

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[4] *Compare Freiberg v. Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1150 (D. Colo. 2002) ("[P]rivate actors seeking to benefit from [§ 1442(a)(1)] bear a special burden of establishing the official nature of their activities."); *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530 (W.D. Ky. 1996); *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (removal is permitted "only when the corporation is so intimately involved with government functions as to occupy essentially the position of an employee of the government"); *Kaplansky v. Associated YM-YWHA's of Greater New York, Inc.*, No. 88 CV 1292, 1989 WL 29938, at *3 (E.D.N.Y. Mar. 27, 1989) (parties complying with subpoena were not "acting under" federal officer because defendants were not "asked to stand in the shoes of [federal] officers or agents and perform 'official' functions"); *New Jersey Dep't of Envtl. Protection v. Viacom, Inc.*, No. Civ. A. 06-1753, 2006 WL

among district courts that apply a regulatory control test, substantial confusion exists over the necessary level of control. *See* Pet. 15 n.8.

Although a division among the courts of appeals normally signals most plainly the need for this Court's intervention, federal *district* courts functionally have the final word on the meaning of § 1442(a)(1) because an "order remanding a case to the State court from which it was removed is not reviewable on appeal." 28 U.S.C. § 1447(d). Nor is an order denying a remand motion immediately appealable except on certification.[5]

Whether a private party can successfully remove a state action based on a "comprehensive control" theory thus depends almost entirely on the federal district court to which the case is removed. This Court should grant review to bring uniformity to these divergent outcomes and to resolve an important question that has confounded – and will continue to confound – the lower federal courts.

3534364, at *2 (D.N.J. Dec. 7, 2006) ("When actual federal officers are seeking removal, the right of removal is liberally construed. However, a private party seeking removal bears a special burden of establishing the official nature of its activities.") (internal citations, alterations, and quotation marks omitted), *with, e.g., In re Wireless Telephone Radio Frequency Emissions Prods. Liab. Litig.*, 327 F. Supp. 2d 554, 562-63 (D. Md. 2004) (applying "direct and detailed" federal control test); *In re 'Agent Orange' Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 447 (E.D.N.Y. 2004) ("acting under" clause is satisfied by showing "substantial degree of direct and detailed federal control"); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992) ("direct and detailed control" alone supports removal).

[5] *See, e.g., Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1064-65 (5th Cir. 1981) ("An order denying remand of a case removed to federal court is not a final order within the meaning of 28 U.S.C. § 1291 and, standing by itself, it cannot be appealed unless certified by the district court according to the provisions of 28 U.S.C. § 1292(b).") (footnote omitted); *Neal v. Brown*, 980 F.2d 747, 748 (D.C. Cir. 1992) (per curiam) (collecting cases).

C. The Wait-And-See Approach Advocated By The Solicitor General Is Unwarranted

The Solicitor General believes it is too early to assess the practical importance of the Eighth Circuit's ruling. Because the court determined that the FTC regulated the tobacco industry to "'an unprecedented extent'" and because the concurring judge below emphasized that "the FTC's direction and control over respondent's activities was 'extraordinary,'" "the extent to which other regulated industries may be able to take advantage of the decision below is, at this point, entirely unclear." SG Br. 16 (quoting Pet. App. 13a, 18a). The Solicitor General concludes that review is "premature" (at 16) and that the issue should be allowed to "ventilate[] in the lower courts" (at 20).

Postponing review, however, is unlikely to advance the state of the law and may have substantial negative effects. *First*, this is not a case in which a narrow, or slightly different, reading of the Eighth Circuit's test would cabin the legal error. The Solicitor General agrees with petitioners that the control test is fundamentally wrong and that federal regulation, no matter how pervasive, cannot be the basis for a private regulated party to avail itself of § 1442(a)(1). *See* SG Br. 12. Thus, Philip Morris's vigorous effort (Supp. Br. 2-7) to rebut the Solicitor General's view of FTC "regulation" ultimately is irrelevant.

Second, even while seeking comfort in the Eighth Circuit's statements that the FTC's regulation of tobacco companies was "unprecedented" and "extraordinary," the Solicitor General contradictorily demonstrates (at 8-11) that the degree of regulation here was in fact minimal. Courts looking beyond the Eighth Circuit's labels will find that numerous industries are subject to regulation that is far more intrusive, coercive, and controlling than what the Eighth Circuit found sufficient to justify removal here. If the decision below is taken seriously, therefore, it will turn a host of regulated entities into federal officers for

purposes of § 1442(a)(1), an outcome that would extend the ruling below far beyond its immediate boundaries.

Third, that no court of appeals has yet endorsed what the Solicitor General believes to be the proper legal standard (*see* SG Br. 19-20) weighs in favor of, not against, this Court's review. Indeed, it is unclear how the Solicitor General expects the courts of appeals to arrive at the proper legal test without this Court's guidance, because the United States will not likely be involved (at the district court or appellate level) in most cases involving private parties with a questionable entitlement to removal.

Fourth, the Solicitor General's wait-and-see approach will undermine the States' substantial interest in remedying deceptive practices aimed at consumers. In letters to the Solicitor General, the Attorneys General of 30 States urged a recommendation that certiorari be granted, warning that "the Eighth Circuit's decision . . . has significant consequences for the States." App., *infra*, 1a. The Attorneys General collectively "file thousands of suits each year attacking pernicious trade practices," and many of those suits involve defendants subject to extensive federal regulation. *Id.* There is "no question," in their view, that regulated entities will invoke the Eighth Circuit's reasoning as a basis for removal. *Id.* at 3a. "A suggestion to wait for another case would be an open invitation . . . to test the waters by removing and litigating over remand motions." *Id.* Even if ultimately successful in obtaining remand to state court, States "would be forced to expend significant and scarce resources," and "meritorious litigation that would have proceeded in state courts will stop while remand motions are litigated." *Id.* at 3a-4a. That result would "hamper[] the deterrent effects of state consumer protection laws." *Id.* at 3a; *see also id.* at 8a ("The mere threat of being able to raise the costs of litigation in this manner may deter necessary state enforcement actions.").

A review of district court proceedings since the decision below substantiates the concern of the Attorneys General.

Private defendants of all types have invoked some version of a control test to support removal, including private insurance companies in an action alleging negligence and breach of duty under state law (*Rizzuto v. Bianchini*, No. Civ. A. 06-6883, 2006 WL 3332832, at *5 (E.D. La. Nov. 14, 2006)); pharmaceutical manufacturers in a case involving state-law claims for wrongful death (*Stanley v. Wyeth Inc.*, No. Civ. A. 06-1979, 2006 WL 2588147, at *2 (E.D. La. Sept. 8, 2006)); railroad companies in a case involving a wrongful death claim based on a train-automobile collision (*Sullivan v. BNSF Ry. Co.*, 447 F. Supp. 2d 1092, 1099 (D. Ariz. 2006)); window-blind manufacturers in a case involving strangulation dangers posed to children (*Alsup*, 435 F. Supp. 2d at 843); automatic implantable cardioverter defibrillator manufacturers in a case involving state-law tort claims (*In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 428 F. Supp. 2d 1014, 1017 (D. Minn. 2006)); a private hospital in an action involving claims of negligence and intentional misconduct (*Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, No. Civ. A. 06-3179, 2006 WL 3396171 (E.D. La. Nov. 21, 2006)); and a mortgage company, lender, and loan servicing company in a case involving claims of fraudulent misrepresentation (*King v. Provident Bank*, 428 F. Supp. 2d 1226, 1231 (M.D. Ala. 2006)).

Although removal was ultimately rejected in some of those cases, at least two district courts relied on the Eighth Circuit's decision in denying motions to remand. *See Kelly v. Martin & Bayley, Inc.*, No. 05-CV-0409-DRH, 2006 WL 44183, at *3-*4 (S.D. Ill. Jan. 9, 2006) (holding, "[b]ased on the reasoning set forth in *Watson*," that federal officer removal by cigarette company was proper); *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1196-97 (M.D. Fla. 2006) (denying remand of negligence claims related to an air transportation accident based on "'detail and specificity'" of federal control) (quoting *Watson*). The Solicitor General's hope (at 15-16) that

the Eighth Circuit's error will be contained is, at least so far, unfounded.[6]

Fifth, the Solicitor General's recommendation takes no account of the burden that an increase in removals by private parties testing the boundaries of the Eighth Circuit's test will have on the already overworked federal judiciary. *See* Pet. 26-30. Given the expansive reach of the Eighth Circuit's test and the Solicitor General's acknowledgment that under no circumstances should regulated parties be able to invoke the federal officer removal statute, there is no justification for burdening federal courts with matters that intrinsically belong in state court. *Cf. City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941) (federal diversity statute is strictly construed to "reliev[e] the federal courts of the overwhelming burden of business that intrinsically belongs to the state courts") (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons and those stated in the petition and reply in support of the petition, the petition for a writ of certiorari should be granted.

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[6] Noting that *Kelly* is pending on appeal in the Seventh Circuit, the Solicitor General without explanation says that, "[r]egardless of the disposition of that case," review is not warranted here. SG Br. 15 n.*. We take the opposite view: regardless of which way *Kelly* is decided, plenary review *is* warranted here. If the Seventh Circuit rejects the Eighth Circuit's approach and holds that removal was improper, there would be a square circuit split, but one that might well evade review given the Solicitor General's forceful denunciation of Philip Morris's theory – the tobacco company defendant may be unwilling to risk the industry's Eighth Circuit win by seeking review of a Seventh Circuit loss. If, on the other hand, the Seventh Circuit embraces the Eighth Circuit's approach and upholds removal, the decision will reinforce concerns that the ripple effect of the Eighth Circuit's error will extend to litigation in other circuits. Either way, the prudent course would be to stem the mischief being created by the Eighth Circuit's judgment.

Respectfully submitted,

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December 27, 2006

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August 23, 2006

SENT VIA FACSIMILE TRANSMISSION

The Honorable Paul D. Clement
Solicitor General
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

Re: *Watson v. Philip Morris*, No. 05-1284

Dear General Clement,

We have learned that the Supreme Court has invited you to express the views of the United States in *Watson v. Philip Morris*, No. 05-1284. We urge you to recommend that certiorari be granted.

This case raises an issue of concern to the States: whether private regulated entities may invoke the federal officer removal provision of 28 U.S.C. § 1442(a)(1) to remove a state-law case to federal court. In our view, the Eighth Circuit's decision upholding Philip Morris's right to invoke this removal provision has significant consequences for the States.

To understand our interest, it is important to recognize the role of the state attorneys general in business regulation. We are the principal enforcers of state laws banning unfair and deceptive trade practices. Collectively, we file thousands of suits each year attacking pernicious trade practices. The defendants in many of those cases are regulated or influenced in some way by some federal official or agency. Though the extent of federal involvement varies considerably, in many instances it matches, and

sometimes exceeds, the involvement of the Federal Trade Commission with regard to so-called "light" cigarettes.

It is also important to recognize the legitimacy of the preference we have for pursuing such actions in the courts of our states. That preference is not a parochial or political one; it is a recognition of the real impact of being forced out of local courts and into the federal system. Some of those concerns are purely practical; our attorneys, victims, and witnesses may lose the chance to try a case down the block rather than across the state. And federal litigation is generally slower and more costly – and thus more burdensome both on our offices and on the victims of unfair business practices.

But equally important is our concern for the development and consistent application of state law. Federal judges typically do not have the same level of experience with the development of state law as do state court judges. And federal judges may not have the same respect for precedent in state systems. Involvement of the federal courts may interfere with the orderly development of the state law we are constitutionally bound to defend and morally bound to advance. State courts are not bound, in future cases, by the federal courts' interpretations of state law. Thus the prospect of wholesale removals to federal court would adversely affect our ability to plan state enforcement actions and to prosecute them with the knowledge and certainty of how state law will develop.

Of course, every extension of the removal power adds to the workload of the federal courts. Such an addition is necessary where Congress specifically directs that a class of cases be heard in federal court. But Congress has not done so here, and there is no sound reason of policy why a privately regulated party should be permitted to take a state enforcement action to federal court under the federal officer removal provision. The purpose of that provision was to protect federal officers from defending their actions in state court. It was not to give a federal forum

to private parties that are regulated by the federal government.

Our greatest immediate concern is with the cost and delay inherent in the removal/remand process. It is expensive, time consuming, and ultimately unproductive to litigate over the appropriateness of removal. Such litigation can delay a case by many months and involve unnecessary expense and effort. The delays associated with litigation over removals hampers the deterrent effects of state consumer protection laws and creates an incentive for defendants to engage in whatever means they can to slow down the dispute resolution process.

There is no question but that businesses whose practices we address – not just tobacco companies – will respond to that incentive. Although the Eighth Circuit sought to limit the reach of its decision, it is worded broadly. Thus private defendants in a range of other contexts have already invoked that rule to justify removal. *See, e.g., Alsup v. 3-Day Blinds, Inc.*, No. 06-244, 2006 WL 1599842 (S.D. Ill. June 8, 2006) (window-blind manufacturer); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 428 F. Supp. 2d 1014 (D. Minn. 2006) (automatic implantable cardioverter defibrillator manufacturer); *King v. Provident Bank*, 428 F. Supp. 2d 1226 (M.D. Ala. 2006) (mortgage company, lender, loan servicing company).

A recommendation by the Solicitor General that the Court defer deciding the propriety of removals in this context would itself send an unwanted message to these private defendants, at least to those businesses in highly regulated sectors. A suggestion to wait for another case would be an open invitation to corporate defendants in highly regulated sectors to test the waters by removing and litigating over remand motions. For States, that would be highly problematic; we would be forced to expend significant and scarce resources in seeking to remand cases to the state courts where they properly belong. All the while, meritorious litigation that would have

proceeded in state courts will stop while remand motions are litigated.

Accordingly, we urge you to recommend that the Supreme Court grant the petition for a writ certiorari.

Sincerely,

Jeremiah W. (Jay) Nixon
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August 8, 2006

The Honorable Paul D. Clement
Solicitor General
United States Department of Justice
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Re: *Watson v. Philip Morris*, No. 05-1284

Dear General Clement:

I am writing in connection with the Supreme Court's order inviting you to express the views of the United States in *Watson v. Philip Morris*, No. 05-1284. I urge you to recommend that certiorari be granted and that the judgment of the Eighth Circuit be reversed.

This case raises a significant issue of great concern for the States: whether private regulated entities may invoke the federal officer removal provision of 28 U.S.C. § 1442(a)(1) to remove a state-law case brought in state court to federal court. In my view, the Eighth Circuit's decision upholding Philip Morris's right to invoke this removal provision is erroneous, and that error has significant potential consequences for other enforcement actions by states.

Many businesses and individuals are subject to some sort of federal regulation; indeed, many agencies have far more extensive regulations of private conduct than the

Federal Trade Commission's policies with respect to so-called "light" cigarettes, the subject of the *Watson* case. Yet the Eighth Circuit held that those policies were sufficiently extensive as to cause Philip Morris to be "acting under" the aegis of federal officers in performing the ordinary commercial function of marketing its products. Notwithstanding some admonitory language in the Eighth Circuit's opinion, it is difficult to see how the rule announced by the Eighth Circuit can be limited to the tobacco context. Indeed, there are private lawsuits involving railroads, medical device manufacturers, lending institutions and others that have already invoked Watson to remove state law cases to federal court on the ground that those industries are also "federal officers."[1]

Such removals are available not just in litigation brought by private plaintiffs, but also in civil enforcement actions brought by state Attorneys General. Thousands of cases are brought each year by state Attorneys General against private entities under state unfair and deceptive trade practices statutes. Such enforcement actions are an important function of state sovereignty. As the Attorneys General of seventeen states informed the Supreme Court in 2004 "[t]he States have a vital interest in preserving their power to regulate traditional areas of states concern, such as the protection of consumers from unfair and deceptive practices."[2] It would be highly disruptive to such state enforcement efforts, and thus contrary to our system of federalism, for state Attorneys General to be forced to

---

[1] *See, e.g., Alsup v. 3-Day Blinds, Inc.*, No. 06-244, 2006 WL 1599842 (S.D. Ill. June 8, 2006) (window-blind manufacturer); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 428 F. Supp. 2d 1014 (D. Minn. 2006) (automatic implantable cardioverter defibrillator manufacturer); *King v. Provident Bank*, 428 F. Supp. 2d 1226 (M.D. Ala. 2006) (mortgage company, lender, loan servicing company).

[2] Brief of the States of Texas, Alabama, California, Connecticut, Illinois, Iowa, Massachusetts, Minnesota, Missouri, Montana, New York, Ohio, Oklahoma, Utah, Vermont, Virginia, and Washington, as *Amicus Curiae* in Support of Petitioners, *Bates v. Dow Agrosciences, LLC*, No. 03-388 (Sept. 13, 2004).

enforce state laws against private entities in federal courts. That outcome is particularly troubling in light of the Federal Trade Commission's and Congress's efforts to promote viable state deceptive practices actions to supplement federal enforcement efforts.

In addition to being contrary to basic notions of federalism, such a permissive view of federal removal authority would create greater uncertainty in state enforcement efforts because of the relative difficulty of predicting how federal courts will interpret state laws, particularly when the state's highest court has not spoken directly to the question in issue.

Even in those situations in which the federal court would not apply the *Watson* rule, states would still be forced to expend resources to litigate unnecessarily over whether such cases should be remanded. The mere threat of being able to raise the costs of litigation in this manner may deter necessary state enforcement actions. Defendants would assert that *Watson* gives them a good-faith basis for removal, so courts would likely be reluctant to impose costs against such defendants for meritless removals.

For these reasons, I urge you to recommend that certiorari be granted now, before those developments cause significant disruptions to state enforcement efforts. Thank you for your consideration.

Very truly yours,

/s/ PEGGY A. LAUTENSCHLAGER

Peggy A. Lautenschlager
Attorney General

407 A

Supreme Court, U.S.
FILED
FEB 26 2007
OFFICE OF THE CLERK

No. 05-1284

In the Supreme Court of the United States

LISA WATSON, ET AL., PETITIONERS

v.

PHILIP MORRIS COMPANIES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a private party doing no more than complying with federal regulation is a "person acting under a federal officer" for the purpose of 28 U.S.C. 1442(a)(1), entitling the actor to remove to federal court a civil action brought in state court under state law.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether the mere fact that a private party's conduct is subject to federal regulatory requirements can suffice to establish that the party is "acting under" a federal officer for purposes of the federal officer removal statute, 28 U.S.C. 1442(a). The United States has a substantial interest in the resolution of that question. Permitting persons who are properly viewed as acting under a federal officer to remove state law actions to federal court ensures that state courts will not interfere with the operations of the federal government. At the same time, allowing persons who are not properly viewed as persons acting under a federal officer to remove may significantly alter the traditional federal-state balance in the adjudication of state law claims. The United States also has an interest in this case because the court below based its decision on its understanding that respondent marketed its "light" cigarettes pursuant to detailed and specific regulation by a federal agency—the Federal Trade Commission (FTC). At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. In general, an action brought in state court may be removed to federal court only if a federal district court would have original jurisdiction of the action. See 28 U.S.C. 1441(a). For a case to fall within the district court's federal question jurisdiction, the federal question must ordinarily appear on the face of the complaint; a federal defense to a

state law claim generally does not suffice. See *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908).

The federal officer removal provision, 28 U.S.C. 1442(a), creates an exception to that general rule. It authorizes removal of any civil action filed in state court against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office." 28 U.S.C. 1442(a). Suits that fall within the scope of Section 1442(a) may be removed even when the federal question arises only by way of a defense to a state law claim. See *Jefferson County* v. *Acker*, 527 U.S. 423, 431 (1999). The purpose of the federal officer removal statute is to ensure that state courts do not unduly interfere with the operations of the federal government. *Willingham* v. *Morgan*, 395 U.S. 402, 406 (1969); *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1880).

To remove an action to federal court successfully under the federal officer removal statute, a defendant must satisfy three requirements. First, the defendant must be a federal officer, a federal agency, or a person acting under a federal officer. 28 U.S.C. 1442(a). Second, the defendant must assert a "colorable" federal defense. *Mesa* v. *California*, 489 U.S. 121, 129, 139 (1989). And third, the defendant must establish that the suit is "for any act under color of such office." 28 U.S.C. 1442(a)(1). In order to satisfy the third requirement, the defendant "must show a nexus, a causal connection between the charged conduct and asserted official authority." *Jefferson County*, 527 U.S. at 431 (citation and internal quotation marks deleted).

2. The Federal Trade Commission (FTC) has authority under Section 5(a)(1) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(a)(1), to prevent "unfair or deceptive acts or practices in or affecting commerce." That au-

thority extends to most industries, including the tobacco industry.

The FTC exercises its authority under Sections 5 and 13 of the FTC Act in two ways. First, the agency may bring an administrative or judicial enforcement action. 15 U.S.C. 45, 53; see 16 C.F.R. 3.1 *et seq.* Such actions are frequently resolved through negotiated consent agreements. See 16 C.F.R. 3.25. Second, the FTC may promulgate trade regulation rules that apply to an entire industry. 15 U.S.C. 57b-3; 16 C.F.R. 1.7-1.20. Rulemaking proceedings require an initial publication of the proposed rule, the opportunity for public comment, and a formal vote by the FTC's commissioners. *Ibid.*

In the 1950s, the FTC became concerned that tobacco companies' advertising claims were inaccurate and misleading to consumers. *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985). After initially advising tobacco companies in 1955 not to make representations about the tar and nicotine levels of their cigarettes, *ibid.*, the FTC issued a policy statement in 1966 stating that a factual statement of the tar and nicotine content based on the "Cambridge Filter Method" (Cambridge Method) would not be treated as deceptive as long as there were no express or implied representations that the specified level of tar or nicotine reduced or eliminated health hazards. *Cigarette Adver. Guides*, 6 Trade Reg. Rep. (CCH) ¶ 39,012.70, at 41,602 (Oct. 6, 2004).

The Cambridge Method "utilizes a smoking machine that takes a 35 milliliter puff of two seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length. The tar and nicotine collected by the machine is then weighed and measured." *Brown & Williamson*, 778 F.2d at 37. Because smoking behavior varies from person to person, the Cambridge Method does not

attempt to replicate the actual amount of tar and nicotine inhaled by human smokers. Pet. App. 3a. The FTC nonetheless endorsed the test "to provide smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands." 62 Fed. Reg. 48,158 (1997).

In 1970, the FTC initiated formal rulemaking to require tobacco manufacturers to disclose the tar and nicotine yields determined by the Cambridge Method test. 35 Fed. Reg. 12,671 (1970). Before the FTC adopted a rule, however, a number of major tobacco companies (including respondent Philip Morris) entered into a voluntary agreement among themselves to disclose Cambridge Method test data in all cigarette advertisements. Pet. App. 3a. That private agreement prompted the FTC to end its rulemaking proceedings. 36 Fed. Reg. 784 (1971); 62 Fed. Reg. at 48,158.

The FTC originally conducted Cambridge Method tests through its own laboratory and published the results in the Federal Register. Pet. App. 3a, 27a; 62 Fed. Reg. at 48,158. An organization funded by major tobacco companies, the Tobacco Institute Testing Lab (TITL), also conducted independent Cambridge Method tests. After the FTC ceased conducting the tests in 1987, the TITL continued to conduct them. *Id.* at 48,158 & n.5.

The FTC has never promulgated official regulatory definitions of terms such as "light" or "low tar." 62 Fed. Reg. at 48,163. In several reports to Congress, the FTC used the term "low tar" to refer to cigarettes containing 15 milligrams or less of tar. See, *e.g.* FTC, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act for the Year 1978*, at 3 (Dec. 24, 1978). Those references, however, did not reflect an official FTC regulatory position.

In 1997, the FTC requested comments on whether it should regulate the tobacco industry's use of descriptive terms in advertising and labeling. 62 Fed. Reg. at 48,158. That request made clear that "[t]here are no official definitions" for terms such as "low tar," "light," or "ultra light," but explained that "they appear to be used by the industry to reflect ranges of FTC tar ratings." *Id.* at 48,163. The FTC did not take any regulatory action in response to that request. In 2002, Philip Morris petitioned the FTC to promulgate a trade regulation rule that would require tobacco companies to: (1) disclose the average tar and nicotine yields of cigarette brands; (2) define and regulate the use of descriptors such as "light" and "ultra light;" and (3) mandate the use of disclaimers with respect to the average tar yield and the health effects of low yield cigarettes. Petition for Rulemaking 1, 32-35, *Tar and Nicotine Testing and Disclosure* (filed Sept. 18, 2002). That petition is still pending before the FTC.

3. Petitioners Lisa Watson and Loretta Lawson filed suit in Arkansas state court against respondent Philip Morris, Inc., alleging that respondent had engaged in unfair business practices in connection with the sale of Cambridge Lights and Marlboro Lights. Pet. App. 1a-2a. Petitioners specifically alleged that respondent designed those cigarettes to register lower levels of tar and nicotine on the Cambridge Method test than would be delivered to actual smokers. *Id.* at 63a-64a. They further alleged that respondent engaged in that conduct in order to achieve support for false and misleading claims that Cambridge Lights and Marlboro Lights are lighter than regular cigarettes. *Id.* at 64a. Petitioners seek to represent a class of persons who purchased Cambridge Lights or Marlboro Lights in Arkansas for personal consumption. *Id.* at 66a.

Relying on the federal officer removal statute, 28 U.S.C. 1442(a), respondent removed the case to the United States District Court for the Eastern District of Arkansas. Pet. App. 74a-75a. Petitioners moved to remand the case, but the district court denied the motion. *Id.* at 20a-60a. It reasoned that respondent was "acting under" a federal officer in its advertising of "light" cigarettes and that removal was therefore appropriate under Section 1442(a). *Id.* at 41a-46a. The court certified for interlocutory review the question whether removal was appropriate under Section 1442(a). *Id.* at 58a-60a.

4. The court of appeals accepted the appeal and affirmed. Pet. App. 1a-19a. The court held that the question whether a defendant is "acting under" a federal officer "depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." *Id.* at 6a. The court explained that while "[m]ere participation in a regulated industry" does not establish grounds for removal, removal is appropriate when "the challenged conduct is closely linked to detailed and specific regulations." *Ibid.* (internal quotation marks and citation omitted). Applying its "acting under" test, the court concluded that the FTC had engaged in detailed regulation of tobacco companies because it had specified details of the Cambridge Method test, published the ratings, and monitored cigarette advertisements. *Id.* at 9a-10a.

The court rejected the argument that the tobacco companies' use of the Cambridge Method test was the result of a voluntary agreement rather than government compulsion. Pet. App. 9a-10a. The court reasoned that the FTC "effectively used its coercive power to cause the tobacco companies to enter the agreement." *Id.* at 10a. The court also concluded that the FTC had effectively enforced the agree-

ment by making "comments" that "suggest[ed] it would bring an action for deceptive advertising or reinstitute formal rulemaking proceedings if a company did not disclose the tar and nicotine ratings" produced by the Cambridge Method. *Id.* at 11a.

The court of appeals next concluded that there was a "causal connection" linking the FTC's actions to the acts challenged in petitioners' complaint. Pet. App. 13a-14a. The court reached that conclusion based on its view that petitioners' suit challenges the FTC's policy judgment that despite the deficiencies in the Cambridge Method, its results "should still be included in advertising, even if alongside 'light' descriptors," in order to prevent deception. *Id.* at 16a. Finally, the court concluded that respondent had raised a colorable federal defense. *Id.* at 16a-17a.

Judge Gruender filed a concurring opinion. He stated that the court's decision depended on the "extraordinary" level of control that the FTC exercises over tobacco companies. Pet. App. 18a.

SUMMARY OF ARGUMENT

The federal officer removal statute limits private party removal to persons who are "acting under" federal officers. 28 U.S.C. 1442(a). A person acts under a federal officer within the meaning of that statute only when that person acts on behalf of or otherwise assists the officer in carrying out the officer's duties. A private party that acts for its own purposes is not acting under a federal officer merely because it acts in compliance with federal regulation.

A. The phrase "acting under" is commonly used to refer to a person in a subordinate position who assists a person in a superior position in carrying out the superior's duties. The evolution and judicial construction of the federal officer

removal statute show that the statutory phrase "acting under" is properly understood in that sense.

The first federal officer removal statute authorized removal by any customs officer and any other person "aiding or assisting" such officer in the discharge and performance of the official's duties. Act of Feb. 4, 1815, ch. 31, §§ 7, 8, 3 Stat. 197-198. Later versions of the statute used the "acting under" formulation, making explicit what had been implicit in the original formulation: that the person aiding the officer must act subject to the supervision, guidance, or oversight of the officer, rather than as an officious intermeddler. But no expansion in the class of persons entitled to remove was intended. Indeed, in *City of Greenwood* v. *Peacock*, 384 U.S. 808, 823 n.20 (1966), the Court explained that the "acting under" formulation drew on the "comparable characterization" of the persons entitled to remove under the original statute.

Peacock's construction of a related removal statute confirms that the two formulations were designed to reach the same class of persons. The removal statute at issue in *Peacock* did not include an "acting under" limitation, but the Court held that the statute implicitly contained such a requirement. 384 U.S. at 821. Of crucial importance here, the Court equated persons acting under federal officers with "persons assisting such officers in the performance of their official duties." *Id.* at 815. The understanding that persons act under federal officers only when they assist such officers in carrying out their official duties is also reflected in the two cases in which the Court has interpreted the "acting under" language in the federal officer removal statute.

B. Limiting the removal right to persons who assist federal officers in carrying out their duties is consistent with the statute's purpose of preventing state court interference with "the operations of the general government." *Tennes-*

see v. *Davis*, 100 U.S. 257, 263 (1880). If the federal government could not receive the help it needs from private parties to carry out its operations, the government's ability to function effectively could be seriously jeopardized. The same cannot be said, however, when a private party is sued in state court for conduct undertaken for purely private purposes, even if the private party was subject to detailed and specific regulatory requirements in so acting. Such persons are not engaged in conduct that serves to advance the government's operations.

C. At the same time, permitting such parties to remove would potentially shift into federal court a wide range of traditional state law claims. Manufacturers of medical devices, cars, pesticides, and consumer products are all subject to detailed and specific federal regulation. It is highly improbable that Congress intended to shift traditional state law claims against such manufacturers into federal court through the federal officer removal statute. Detailed and specific federal regulation may well supply a federal preemption defense. But except in the case of complete preemption, the existence of such a defense has never been viewed as a sufficient basis to transfer a traditional state law claim against a private party into federal court. It is implausible that Congress silently authorized wholesale evasion of that established principle by means of the federal officer removal statute.

D. Court of appeals decisions illustrate the proper scope of removal under the "acting under" provision of the federal officer removal statute. As those cases establish, the provision is critically important in protecting those who assist federal officers in performing their work, in both the law enforcement context and in other settings. But it does not extend to those subject to a federal regulatory regime, even a pervasive one.

E. Tobacco manufacturers that market "light" cigarettes do not remotely act under federal officers. Such manufacturers hardly market "light" cigarettes on the FTC's behalf; they do so solely to further their own economic interest. Nor does it matter that they pursue their own interest in asserted compliance with federal law. Compliance is just what the law expects. It does not transform a private party that acts to further its own economic interest into a party assisting federal officers in carrying out their duties. Because respondent did not act on behalf of or otherwise assist federal officers in carrying out their official duties, it had no right to remove petitioner's state law action to federal court.

ARGUMENT

A PERSON ACTS "UNDER" A FEDERAL OFFICER ONLY WHEN THAT PERSON ACTS ON BEHALF OF OR OTHERWISE ASSISTS THE OFFICER IN CARRYING OUT THE OFFICER'S OFFICIAL DUTIES

As relevant here, the federal officer removal statute, 28 U.S.C. 1442(a), affords a right of removal to any "officer (or any person acting under that officer) of the United States * * * for any act under color of such office." The court of appeals in this case held that a private entity is "acting under" a federal officer for purposes of that statute whenever it acts pursuant to "detailed and specific regulations." Pet. App. 6a (citation and internal quotation marks omitted); see *ibid.* ("comprehensive and detailed regulation"); *id.* at 13a ("comprehensive and detailed control") (citation omitted). That reading of the statute expands it far beyond its intended scope. A private person acts under a federal officer within the meaning of the federal officer removal statute only when that person acts on behalf of or otherwise assists the officer in carrying out the officer's official duties. A

private party that acts for its own private purposes is not "acting under" a federal officer merely because it does so in compliance with detailed and specific federal regulations.

A. The Text, Evolution, And Judicial Construction Of The Federal Officer Removal Statute Make Clear That It Permits Removal By Private Parties Only When They Act On Behalf Of Or Otherwise Assist Federal Officers In Carrying Out Their Official Duties

As presently codified, Section 1442(a) confers removal rights on persons "acting under" a federal officer. In ordinary parlance, the term "under" indicates, *inter alia*, "subjection, guidance, or control," or "[s]ubject to the guidance and instruction of." *Webster's New International Dictionary of the English Language* 2765 (2d ed. 1958); see *Funk & Wagnalls New Standard Dictionary of the English Language* 2604 (1946) ("[s]ubordinate or subservient to," "[s]ubject to guidance, tutorship, or direction of"); see also *The Random House Dictionary of the English Language* 1543 (1966) (defining "under" to mean, *inter alia*, "in the position or state of * * * supporting [or] sustaining"). Thus, when used to describe conduct by one person in relationship to another, "under" is commonly used to describe a person or entity in a subordinate position who acts on behalf of or otherwise assists the person in the superior position to carry out the superior's duties. *Webster's* 2765 ("he fought *under* Cromwell"); *Random House* 1543 ("a bureau functioning under the prime minister"). The evolution and judicial construction of the federal officer removal statute confirm that the statutory phrase "acting under" is properly understood in that sense.

1. The current version of the federal officer removal statute is the end-product of a series of congressional enactments beginning in the early years of our Nation's history,

and an examination of those historical antecedents sheds considerable light on the statute's scope and purpose. See *City of Greenwood* v. *Peacock*, 384 U.S. 808, 814-815 (1966) (interpreting related removal statute in light of its historical antecedents). The "primordial" federal officer removal statute, *id.* at 821 n.17, was enacted in 1815 "as part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular." *Willingham*, 395 U.S. at 405. The 1815 Act allowed removal by customs collectors and other officers involved in enforcement of the customs laws "*or any other person aiding or assisting*" under color of that statute. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198 (emphasis added). The statute elsewhere indicated that the private parties entitled to remove were citizens called upon by a customs officer to "aid and assist such officer in the discharge and performance of his duty," such as by seizing embargoed goods. § 6, 3 Stat. 197.

The 1815 removal provision expired at the end of the War, but in 1833, in response to South Carolina's threats of nullification, see *Willingham*, 395 U.S. at 405, Congress authorized removal by "any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States." Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633. While that provision referred to any "other person" rather than to "any person aiding or assisting," there is no indication that a substantial difference in meaning was intended. In addition to the persons covered by the previous provision, the statute contemplated only two additional classes of persons who would have a right to remove: members of the land, naval, or militia forces empowered to protect the customs officers from unruly mobs, § 1, 4 Stat. 632, and persons who claimed title to land under the authority of the revenue laws, § 3, 4 Stat. 633. Inclu-

sion of the latter class may have caused Congress to use the term "person" rather than "person aiding or assisting." *Peacock*, 384 U.S. at 821 n.17.

Congress enacted a series of federal officer removal statutes during the Civil War "which applied mainly to cases growing out of the enforcement of the revenue laws." *Willingham*, 395 U.S. at 405-406. One such statute separately protected any revenue officer, "any person acting under or by authority of any such officer on account of any act done under color of his office," or "any person holding property or estate by title derived from any such officer." Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171. The statute elsewhere made clear that the category of persons "acting under" revenue officers were persons engaged in acts under or by the authority of revenue officers "for the collection of taxes." § 67, 14 Stat. 172. Thus, while using different language, the 1866 Act gave a right of removal to essentially the same class of persons as the original federal officer removal statute: persons aiding federal officers in the enforcement of revenue laws. The "acting under" formulation made explicit what had been implicit in the original formulation: that the person assisting the officer must be subject to the supervision, guidance, or oversight of the officer, rather than an officious intermeddler. But no expansion in the class of persons entitled to remove was intended.

Indeed, the Court made clear in *Peacock* that the "acting under" terminology adopted in the 1866 Act did not signal a substantive departure from the original 1815 Act's reference to "any other person aiding or assisting" a federal revenue officer. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198. The Court explained that "[a]lthough, in the revenue officer removal provision of the Revenue Act of 1866 * * *, Congress expressly characterized the 'other person' as one 'act-

ing under or by authority of any [revenue] officer,' that statute obviously drew on the *comparable characterization* of the 'other person' in the Customs Act of 1815." 384 U.S. at 823 n.20 (emphasis added).

The 1866 version of the removal provision was eventually codified into a permanent statute. See Rev. Stat. § 643 (1874); Judicial Code of 1911, ch. 231, § 33, 36 Stat. 1097. As part of the 1948 recodification of the Judicial Code, Congress enacted the provision containing the critical language at issue here. Act of June 25, 1948, ch. 646, § 1, 62 Stat. 938 (28 U.S.C. 1442(a)). That enactment expressly expanded the right of removal to encompass any federal officer and any person "acting under" any such officer.

The expansion of the removal right from any *revenue* officer to any *federal* officer necessarily worked a corresponding expansion in the class of private parties entitled to remove. While the previous statute allowed private parties to remove when they assisted revenue officers in their duty to enforce the revenue laws, the 1948 statute allows private parties to remove when they assist *any* federal officer in carrying out that officer's duties, regardless of whether those duties involve enforcement of the revenue laws, or indeed enforcement activity of any kind. See U.S. Cert. Stage Amicus Br. 17-18.

That expansion was significant, but the 1948 provision did not expand the class of private parties eligible to remove in any other way. In particular, while Congress did expand the universe of federal officers directly covered by the provision, it did not expand the scope of derivative coverage for those assisting any federal officer directly covered by the statute—whether a revenue officer or a federal officer included for the first time. There is nothing in the text of that provision to suggest that Congress intended a novel expansion of the removal right to encompass persons

who are not involved in assisting federal officers in the performance of their duties, but instead are simply the objects of detailed and specific government regulation.

Nor is there anything in the legislative history that would support that sweeping expansion of the class of persons eligible to remove. Indeed, other than federal officers, the legislative history refers to only one class of persons eligible to remove—federal "employees." H. R. Rep. No. 308, 80th Cong., 1st Sess. A-134 (1947). Not only do federal employees assist federal officers in the performance of their official duties; that is their job. To be sure, the committee report's reference to federal "employees" cannot be understood to suggest that private parties are categorically ineligible for removal under Section 1442(a)(1); the text and genesis of the statute preclude that result. The point is simply that the legislative history affords no basis for uprooting the statute from its historic context by construing it to encompass not only persons who assist federal officers in the performance of their official duties, but also persons who are the object of detailed and specific government regulation.

2. The Court's decision in *Peacock* reinforces the conclusion that the federal officer removal statute applies to private parties only when they act on behalf of or otherwise assist federal officers in the performance of their official duties. In *Peacock*, the Court interpreted a related removal provision, 28 U.S.C. 1443(2). That provision authorizes removal of a civil action "for any act under color of authority derived from any law providing for equal rights." In light of that provision's text and history, the Court held that it was implicitly "limited to federal officers and those acting under them." 384 U.S. at 821. Of crucial importance here, the *Peacock* Court equated the phrase persons "acting under" federal officers with "persons assisting such officers in

the performance of their official duties," *id.* at 815, and with persons "authorized to act with or for them in affirmatively executing duties under any federal law." *Id.* at 824.

As a matter of logic and interpretive consistency, the Court's construction of the implicit "acting under" limitation at issue in *Peacock* is equally applicable to the express "acting under" limitation contained in the federal officer removal statute. Indeed, as discussed above, the *Peacock* Court suggested as much, noting that Congress's adoption of the "acting under" terminology in 1866 for purposes of the federal officer removal statute "obviously drew on" the "comparable characterization" in the 1815 Act, *i.e.*, persons "aiding or assisting" federal revenue officers. 384 U.S. at 823 n.20. Similarly, the Court described the 1874 codification of the federal officer removal statute (which employed the same "acting under" terminology) as "applicable to federal officers *and persons assisting them.*" *Id.* at 820 n.17 (emphasis added). Accordingly, in accordance with *Peacock*, the "acting under" limitation in the federal officer removal statute must be understood to confine private-party removal to "persons assisting [federal] officers in the performance of their official duties." *Id.* at 815.

3. That understanding is also reflected in the two cases in which the Court has interpreted the "acting under" language in the federal officer removal statute. In both cases, the Court held that persons act under a federal revenue officer when they assist the officer in the performance of the officer's duties.

In *Davis* v. *South Carolina*, 107 U.S. 597 (1883), a corporal of the United States infantry was detailed to assist a revenue officer in making an arrest under the revenue laws. After a state criminal prosecution arising out of the arrest was brought against him, he sought to remove the case to federal court under a predecessor statute that authorized

removal by persons acting under or by the authority of a revenue officer. The Court held that the corporal was entitled to remove because the removal statute "shields all who lawfully assist [a revenue officer] in the performance of his official duty," and the corporal "was acting in that capacity." *Id.* at 600.

Similarly, in *Maryland* v. *Soper*, 270 U.S. 9 (1925), federal prohibition agents and their chauffeur sought to remove a state criminal prosecution to federal court. The predecessor statute at issue authorized removal by officers appointed under the federal revenue laws and persons acting under or by their authority. The Court held that the four prohibition agents were officers acting under the authority of the revenue laws within the meaning of the removal statute. *Id.* at 31. The Court further observed that, because the chauffeur was acting as a "helper to the four officers under their orders," he had "the same right to benefit of [the removal statute] as they." *Id.* at 30.

The Court in *Soper* ultimately concluded that the defendants had not sufficiently alleged that the prosecution was for official acts and that they therefore were not entitled to remove the case. 270 U.S. at 35. But the relevant point for purposes of this case is the Court's recognition that a person acting as a "helper" to a federal officer in the performance of his official duties is "acting under" that officer for purposes of the removal statute. *Davis* and *Soper* thus confirm that a person acts under a federal officer when he assists the officer in the performance of his official duties.

B. Limiting Private-Party Removal To Persons Assisting Federal Officers In The Performance Of Official Duties Accords With The Purpose Of The Federal Officer Removal Statute

Limiting removal to persons who assist federal officers in the performance of their official duties is consistent with

the purpose of the federal officer removal statute. This Court has recognized that the purpose of the statute is to prevent state court interference with the operations of the federal government. *Willingham*, 395 U.S. at 406; *Davis*, 100 U.S. at 263. The Court in *Davis* described the purpose of the officer removal statute as follows (*ibid.*):

> [The federal government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members.

The need to prevent state court interference with the federal government's own operations is directly implicated when a State seeks to hold a private party accountable for actions that assisted a federal officer in carrying out that officer's duties. If the federal government could not receive help from private parties to carry out its operations, the federal government's ability to function effectively could be placed in serious jeopardy. But the compelling need to protect the government's own operations is generally not implicated when a private party is sued in state court for conduct undertaken for purely private purposes, even if the private party was subject to detailed and specific federal regulatory requirements in so acting. Such conduct is not engaged in on behalf of or for the assistance of federal officers in the performance of their official duties, and thus does not serve to advance "the operations of the general government."

Indeed, the existence of a detailed federal regulatory regime may well be an indication that the private conduct at issue, far from advancing the government's own operations, is instead potentially harmful, hazardous, or otherwise disfavored under federal law.

C. Permitting Removal By Private Parties Subjected To Detailed And Specific Federal Regulation Would Potentially Shift Into Federal Court A Wide Range Of Traditional State Law Claims

This Court has long interpreted removal statutes against the background understanding that, except when overwhelming federal interests are implicated, Congress ordinarily intends to respect the interest of the States in providing state forums for the vindication of state law claims against private parties, even if they possess a substantial federal law defense. That understanding of congressional intent is reflected in the well-pleaded complaint rule, under which (absent diversity jurisdiction) a state court action involving state law claims ordinarily may not be removed to federal court under the general removal provision, 28 U.S.C. 1441(a), even when the merits of a federal defense may be the dispositive issue in the litigation. See *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 112 (1936).

Similarly, the Court has held more recently that the existence of a federal law counterclaim is not sufficient to satisfy the well-pleaded complaint rule. *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830-832 (2002). The Court explained that permitting defendants to secure removal to federal court by alleging a federal law counterclaim "would radically expand the class of removable cases, contrary to the due regard for the rightful independence of state governments that [the Court's] cases

addressing removal require." *Id.* at 832 (internal quotation marks, brackets, and citation omitted).

Due regard for the States' interest in providing state law forums for the vindication of state law claims has also informed the Court's decisions that identify when the presence of a federal law ingredient in a state law cause of action may provide a basis for removal under Section 1441(a). For example, in *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986), the Court held that state law negligence actions asserting that alleged violations of a federal law standard constitute presumptive negligence are not removable under Section 1441(a). As the Court subsequently explained, *Merrell Dow* interpreted Section 1441(a) to preclude removal of such an action because permitting removal would "have heralded a potentially enormous shift of traditionally state cases into federal courts," and it was "improbable" that Congress would have wanted to alter the traditional state-federal balance in that manner. *Grable & Sons Metal Prods., Inc.* v. *Daure Eng'g & Mfg.*, 545 U.S. 308, 319 (2005).

Thus, this Court will not lightly conclude that a removal statute has dramatically altered the usual federal-state balance. That principle is directly implicated here, because the rule of law adopted by the court below—which would permit removal to federal court whenever a private party is sued for conduct that was subject to a detailed and specific federal regulatory regime—has the potential to transfer to federal court a wide array of traditional state law cases.

That is particularly true in light of the court of appeals' relatively lax standard for determining whether regulatory conduct qualifies as "detailed and specific" so as to make removal available. Pet. App. 6a. In this case, petitioners have alleged that respondent designed Cambridge Lights

and Marlboro Lights to register lower levels of tar and nicotine on the Cambridge Method test than would be delivered to actual smokers, and that it did so to support its false and misleading representations that those cigarettes are lighter than regular cigarettes. *Id.* at 63a-64a. In holding that respondent was subject to detailed and specific federal regulation with respect to those alleged marketing activities, the court of appeals pointed to essentially three factors: that the FTC had developed and specified the details of the Cambridge Method test; that the FTC had published the results of the tests; and that the FTC had monitored cigarette advertisements and brought deceptive advertising claims in some cases. Pet. App. 9a-10a. The court viewed that level of regulation as sufficiently detailed and specific to satisfy its removal standard even though: (1) the FTC has never required tobacco companies to use the Cambridge Method to determine tar levels or to report the results of those tests in advertising; (2) the FTC has never adopted any official regulatory definitions of the terms "light," or "low tar"; and (3) the FTC has neither requested nor required tobacco companies to describe or advertise their cigarettes using those or any other such descriptors. See pp. 3-5, *supra*.

If that level of regulation is sufficiently detailed and specific to justify removal of petitioners' claims under the court of appeals' standard, then that standard would potentially allow removal into federal court of a large number of traditional state law cases. Numerous private entities are subject to government regulation that is at least as detailed and specific as that identified by the court of appeals here, and would seemingly be in a position to remove to federal court any state-law challenges to their regulated conduct. Although the concurring opinion suggested that the circumstances of this industry are unique, the essence of what the

court of appeals required—a detailed regulatory structure with a regulatory safe harbor (for federal law purposes) for products that comply with the federal regulatory requirements—is far from unique.

For example, manufacturers of Class III medical devices must undergo a rigorous pre-market approval process that examines the safety and effectiveness of the product. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 477 (1996). Manufacturers of Class III devices must also comply with FDA standards for the manufacturing and labeling of their products. *Id.* at 497. And the FDA has issued detailed regulations that specify how certain products must be tested or labeled. *E.g.*, 21 C.F.R. 800.20, 801.430, 801.420, 801.435.

Similarly, vehicle manufacturers must comply with specific design and performance standards issued by the Department of Transportation's National Highway Traffic Safety Administration (NHTSA). 49 C.F.R. Pt. 571; see *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 875-877 (2000); *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 284 & n.2 (1995). Automobile manufacturers must also comply with detailed fuel efficiency and testing standards issued by the Environmental Protection Agency (EPA). 40 C.F.R. Pt. 86.

There are numerous other examples of extensive federal regulation. Pesticide manufacturers must comply with a "comprehensive regulatory statute" that requires registration of the pesticide with EPA, an EPA determination of safety and effectiveness, and compliance with EPA labeling standards. *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 437-438 (2005). The Department of Energy establishes detailed energy and water conservation standards for a wide range of home products, such as kitchen appliances, air conditioners, and television sets, and prescribes the specific method for testing the products to ensure that they

meet those standards. 10 C.F.R. Pt. 430. The Consumer Product Safety Commission has established specific safety standards for numerous consumer products, such as bicycle helmets, baby cribs, and sleepwear as well as tests for determining compliance with its standards. 16 C.F.R. Pts 1000-1750. See *e.g.* 16 C.F.R. Pt. 1616. And the Occupational Safety and Health Administration (OSHA) has issued detailed and specific regulations that require employers to limit the exposure of their employees to certain hazardous substances. 29 C.F.R. Pt. 1910.

In each of those areas, States may have established their own consumer protection standards and provided for enforcement of those standards in their own courts. Under the court of appeals' "detailed and specific regulation" removal test, those actions would potentially be subject to removal under the federal officer removal statute. It is improbable, to say the least, that Congress intended for the federal officer removal statute to serve as the vehicle for the removal of such a large number of traditional state law suits to federal court.

To be sure, the existence of an extensive federal regulatory regime could well furnish a preemption defense to a state law claim. But except in the rare case of complete preemption, the existence of a preemption defense has never been viewed as a sufficient basis for a private party to remove a state law claim to federal court. See *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 6-8 (2003); *Gully*, 299 U.S. at 116. It is simply not plausible that Congress silently authorized wholesale evasion of that established principle by means of the federal officer removal statute.

D. A Proper Understanding Of The Scope Of The Federal Officer Removal Statute Leaves Ample Room For Removal By Private Parties In Appropriate Cases

Courts of appeals applying the federal officer removal statute in the context of private-party removal have generally focused on the degree of federal oversight or control of the private party's activities, sometimes without explicitly considering whether the private party was acting on behalf of or otherwise assisting federal officers in the performance of their duties. As has been discussed, a proper understanding of the text, evolution, judicial construction, and purposes of the federal officer removal statute makes clear that consideration of those latter factors should guide the removal analysis. Nonetheless, the decisions of a number of courts of appeals serve to illustrate the proper scope of private-party removal under Section 1442(a)(1), and how far outside the proper scope the decision below ventures.

For example, in *Venezia* v. *Robinson*, 16 F.3d 209 (7th Cir.), cert. denied, 513 U.S. 815 (1994), a state employee solicited a bribe as part of a sting operation conducted by FBI agents. Because the state employee was soliciting the bribe in aid of a sting operation run by federal officers, the court correctly concluded that the employee was acting under federal officers within the meaning of the federal officer removal statute. *Id.* at 211-212.

Similarly, in *Camacho* v. *Autoridad de Telefonos*, 868 F.2d 482 (1st Cir. 1989), telephone companies participated in the wiretapping of certain phone lines under the direction of federal agents. Because the telephone companies were assisting federal officers engaged in "official" law enforcement activity, and they were doing so at "federal behest," the court properly held that they were acting under

federal officers within the meaning of the federal officer removal statute. *Id.* at 486.

As those cases and the historical background of the removal statute demonstrate, the federal officer removal statute is most obviously implicated when private individuals are aiding law enforcement activity. Persons eligible for removal under that rationale would include not only undercover agents or informants who participate in a sting operation and telephone companies that place a wiretap on a line at federal behest, but also cooperating witnesses who aid a federal investigation by providing needed information. See Act of Feb. 4, 1815, ch. 31, §§ 7, 8, 3 Stat. 198 (an "informer" providing information leading to forfeiture is a person "aiding or assisting" a customs officer in the enforcement of the customs laws).

Because the federal officer removal statute now extends to all federal officers, and is not limited to those who engage in law enforcement activity, however, private-party removal under the statute is not limited to those private parties who provide aid to federal law enforcement officers. Rather, the right of removal extends to any private person who assists a federal officer in performing the officer's duties, regardless of the nature of those duties.

Thus, a surgeon who is subject to the authority of officers in the Veterans Administration (VA) acts under a federal officer when he performs surgery at a VA hospital. *Noble* v. *Employers Ins. of WAUSAU*, 555 F.2d 1257, 1258-1259 (5th Cir. 1977). Such a person aids VA officers in carrying out their duty to provide health care to veterans.

Similarly, a bank that is designated as a financial agent of the United States to provide banking services on a military base and that is subject to the direction of the Secretary of the Treasury regarding the services to be provided is properly characterized as acting under a federal officer

in providing those services. *Texas* v. *National Bank of Commerce*, 290 F.2d 229, 231 (5th Cir.), cert. denied, 368 U.S. 832 (1961). Such a bank, while not engaged in law enforcement, is therefore entitled to remove to federal court an action filed in state court claiming that its provision of banking services violates state law. *Ibid.*

Finally, a private citizen delegated authority to inspect aircraft by the Administrator of the Federal Aviation Administration (FAA) acts under a federal officer in conducting such an inspection and issuing a certificate of airworthiness. *Magnin* v. *Teledyne Cont'l Motors*, 91 F. 3d 1424 (11th Cir. 1996). That is true regardless of whether the private individual is viewed as performing a law enforcement role or a safety protection role. The critical point is that the individual acts on behalf of the FAA Administrator in conducting the inspection.

In each of the foregoing cases, the defendant was acting on behalf of or otherwise assisting a federal officer in the performance of the officer's duties, and the overall activity at issue was subject to some form of federal guidance, direction, or oversight. In those circumstances, a private party is properly characterized as acting under a federal officer within the meaning of the federal officer removal statute. Such conduct is far removed from the actions of a party who does not directly assist in a federal officer's duties, but is merely subject to a pervasive federal regulatory regime.

E. The Court Of Appeals' Reasons For Holding That Respondent Was Acting Under A Federal Officer In Marketing "Light" Cigarettes Are Unpersuasive

In contrast to the foregoing cases, the decision below reflects a misapplication of the federal officer removal statute. Section 1442(a)(1) does not remotely encompass to-

bacco manufacturers that market their cigarettes as "light," because in so doing the tobacco companies are not acting on behalf of federal officers or otherwise assisting federal officers in carrying out their duties. Respondent hardly markets "light" cigarettes on the FTC's behalf; it does so solely in furtherance of its own economic interest. Nor does it matter that respondent pursues its economic interest in alleged conformity with a federal regulatory safe harbor. "Compliance is just what the law expects." *Walling* v. *Harnischfeger Corp.*, 242 F.2d 712, 713 (7th Cir. 1957). Mere compliance with federal law does not transform a private party that is acting solely to further its own economic interests into a party that is acting on behalf of or otherwise assisting federal officers in carrying out their duties.

The court of appeals gave three reasons for holding that respondent was acting under a federal officer in marketing light cigarettes. None is persuasive.

1. First, the court of appeals sought to rely on cases holding that federal contractors act under a federal officer when they perform their work in accordance with detailed and specific contract standards. Pet. App. 6a-8a. But there is a fundamental difference between federal contractors and respondent. Federal contractors supply products or services that the government affirmatively seeks and desires to support its own operations, and, in so doing, they perform tasks that the government would otherwise have to perform itself through its own employees. Accordingly, while federal contractors undoubtedly act for their own commercial gain, in appropriate circumstances, they may also reasonably be viewed as assisting federal officers in

carrying out their official duties within the meaning of the federal officer removal statute.[1]

Tobacco companies that market "light" cigarettes do not share the relevant characteristics of government contractors. They are not providing a product that the government affirmatively seeks for its own purposes, and they are not producing a product or service that the government would otherwise be forced to produce for itself through its own employees. Instead, they are acting solely for their own commercial gain. Tobacco companies marketing "light" cigarettes therefore cannot reasonably be viewed as acting on behalf of or otherwise assisting federal officers in carrying out their official duties.

2. Second, the court concluded that it was required by this Court's decisions in *Willingham*, 395 U.S. at 407, and *Colorado* v. *Symes*, 286 U.S. 510, 517 (1932), to give the

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[1] In *Logue* v. *United States*, 412 U.S. 521 (1973), this Court held that employees of federal government contractors are not employees of the United States for purposes of federal tort liability under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), and are not "persons acting on behalf of a federal agency in an official capacity" for purposes of 28 U.S.C. 2671, when (as is generally the case) the federal government lacks authority to control the day-to-day physical activities of the contractor's employees. A determination that a particular government contractor was assisting a federal officer in carrying out the officer's duties by, for example, supplying goods or services in furtherance of those duties would not support a determination that the contractor's employees were employees of the United States for purposes of the FTCA, 28 U.S.C. 2671, or any other purposes, because the category of persons acting under a federal officer is not limited to those persons whose day-to-day activities are controlled by a federal officer. The key criterion under Section 1442(a)(1) is instead whether the private person is assisting the federal officer in the performance of the officer's duties, and generalized federal oversight or guidance (as opposed to specific and detailed day-to-day control) is sufficient to justify removal when that key criterion is satisfied.

federal officer removal statute "a broad and liberal interpretation." Pet. App. 12a-13a. The federal government does not have a quarrel with those salutary principles, but they provide no basis for extending the statute to entities that do not help federal officials perform their duties, but rather are the subjects of pervasive federal regulation. Moreover, the federal officer removal statute must not only be interpreted in keeping with its important purpose of protecting federal officials and those who assist them, but must also be informed by the statute's historical antecedents, *Peacock*, 384 U.S. at 814-815, and the principle that the Court will not lightly assume that Congress has effected a potentially dramatic shift in the federal-state balance. *Grable*, 545 U.S. at 319; *Holmes Group*, 535 U.S. at 832. For the reasons previously discussed, when the statutory text is interpreted in light of those considerations, it compels the conclusion that a person acts under a federal officer only when he acts on behalf of or otherwise assists the officer in carrying out official duties—a standard that respondent cannot satisfy.

3. Ultimately, the court of appeals bottomed its decision on its assessment that respondent marketed its "light cigarettes in compliance with detailed and specific FTC regulation. Pet. App. 6a-13a. For reasons discussed in this brief (p. 21, *supra*), and at greater length in the government's brief at the petition stage (Br. 8-12), the court of appeals' assessment is incorrect. Far from issuing detailed and specific regulations that govern respondent's marketing of light cigarettes, the FTC has not issued any such regulations at all. Of particular importance, the FTC has neither requested nor required tobacco companies to describe their products as "light."

More fundamentally, for the reasons discussed, the court of appeals' exclusive focus on the presence or absence of

detailed and specific federal regulatory control is both over- and under-inclusive. The federal officer removal statute does not permit removal when a private commercial actor merely pursues its own economic interests, even when it does so in accordance with detailed and specific government regulations. Instead, private-party removal is permissible only when the private party acts on behalf of or otherwise assists a federal officer in carrying out that officer's official duties—a category of private conduct that will necessarily entail some form of federal oversight, but not necessarily (or even usually) "detailed and specific" control. Because respondent marketed "light" cigarettes for its own commercial gain and not to assist federal officers in carrying out their official duties, it had no right to remove petitioner's state law claim to federal court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

LISA WATSON, ET AL.,
Petitioner,

v.

PHILIP MORRIS COMPANIES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE BLUE CROSS AND BLUE SHIELD ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICUS CURIAE

The Blue Cross and Blue Shield Association ("BCBSA") is the national association of Blue Cross and Blue Shield companies. It comprises thirty-nine independent, locally owned Blue Cross and Blue Shield Plans. The Blue Cross and Blue Shield companies, through relationships with federal, state, and local government entities, employers, employee benefits plans, and individual subscribers, administer or insure health benefits for over 90 million Americans. In their relationships with the federal government, Blue Cross and Blue Shield Plans (often in conjunction with BCBSA) administer or insure health benefits under various federal programs through contracts with federal agencies, including: Medicare, which provides health benefits to the elderly (*see* 42 U.S.C. §§ 1395 *et seq.*); the Federal Employees Health Benefits Program ("FEHBP"), which provides health benefits to federal employees and annuitants and their dependents (*see* 5 U.S.C. §§ 8901-8914); and Tricare (formerly known as the Civilian Health and Medical Program of the Uniformed Services, or "CHAMPUS"), which provides health benefits to dependents of individuals in military service (*see* 10 U.S.C. §§ 1071 *et seq.*).[1]

This case involves the construction of 28 U.S.C. § 1442(a)(1), a statute that permits the removal of state court suits, in delineated circumstances, to federal court by agencies and officers of the United States and "any person acting under" them. In particular, in a matter of first impression for this Court, the case focuses on the extent to which a private party appropriately is deemed to be acting under a federal agency or officer, so as to invoke § 1442(a)(1). As entities involved, through government

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[1] In accordance with Rule 37.6, BCBSA certifies that counsel for a party did not author this brief in whole or in part and that no entity other than BCBSA, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

contracts, in the administering or insuring of health benefits under federal benefits programs, BCBSA's members have successfully relied on § 1442(a)(1) in prior instances. Because the Court's decision in this case may establish the governing standard for a private party's removal of a state court action under § 1442(a)(1), thereby potentially affecting the continued ability of BCBSA's members to invoke the statute, BCBSA has an interest in this case.

BCBSA, however, takes no position on the correct outcome for the case. Its interest is in the Court's establishment of the proper legal standard for a private party's removal of a state court action under § 1442(a)(1), a standard that should be consistent with the substantial body of existing case law readily allowing government contractors, especially those administering significant federal health benefits programs, the right to remove actions to federal court.

Counsel for the parties have filed letters with the Clerk of the Court consenting to the filing of all *amicus* briefs in this case.

SUMMARY OF ARGUMENT

The Eighth Circuit's decision in this case raises the question of who properly is deemed a "person acting under" a federal officer or agency for purposes of removal under § 1442(a)(1), a statute that this Court has long given a liberal construction. As the lower courts have consistently held, the operative language can encompass private parties. Its extension in appropriate circumstances to private parties derives from the fact that, with increasing frequency, the government must rely on relationships with private entities to accomplish its many objectives.

Though the courts thus far have not established a hard-and-fast rule for determining when a private party is "acting under" a federal officer or agency, two lines of authority have emerged under which the courts agree that private parties may invoke § 1442(a)(1). First, the courts have

regularly held that the statute covers government contractors who are sued under state law for actions taken at the direction of a federal officer or agency. Second, the courts agree that private entities (including government contractors) who administer on-going federal programs, in particular federal health benefits programs, are entitled to remove under § 1442(a)(1). In the latter decisions, removal is warranted even if the government has not specifically directed the activities at issue in the case, so long as the plaintiff's allegations arise from actions taken by the private party in the course of administering the federal program.

The Respondents' situation does not fall squarely within the confines of these decisions, and BCBSA takes no position on whether the Court should further extend § 1442(a)(1) to cover this case. At a minimum, however, the Court should, in resolving the question in this matter, ensure that any standard established for the removal of actions by private parties under § 1442(a)(1) is broad enough to allow for removal in situations similar to those involved in the government-contractor and federal-programs precedents. The decisions are well-established, are well-reasoned, are consistent with § 1442(a)(1)'s purposes, and have never been questioned by Congress.

ARGUMENT

I. SECTION 1442(a)(1) BROADLY ENCOMPASSES REMOVAL BY PRIVATE PARTIES

Under 28 U.S.C. § 1442(a)(1), a "civil action or criminal prosecution commenced in a State Court . . . may be removed . . . to the [appropriate] district court of the United States" if it is brought against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office." The statute has a lineage dating back to 1815, with Congress having enacted the current iteration in 1948 and amended it in 1996. *See Willingham v. Morgan*,

395 U.S. 402, 405 (1969); Federal Courts Improvements Act of 1996, Pub. L. No. 104-317, § 206(a), 110 Stat. 3847, 3850.

Section 1442(a)(1)'s purpose "is not hard to discern." *Willingham*, 395 U.S. at 406. It is designed to "protect" federal authorities "from interference by hostile state courts." *Id.* at 405. In this regard, from the time of its first decisions addressing the statute, the Court has emphasized:

> [T]he Federal Government "can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, -- if their protection must be left to the action of the State court, -- the operations of the general government may at any time be arrested at the will of one of its members."

Id. at 406 (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1880)).

Because the statute "'is an incident of federal supremacy,'" it is to be given a "broad application." *Peterson v. Blue Cross/Blue Shield of Tex.*, 508 F.2d 55, 58 (5th Cir. 1975) (quoting *Willingham*, 395 U.S. at 405); *accord Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998) (listing decisions involving § 1442(a)(1) that "not[e] Supreme Court requirement of liberal interpretation"). Section 1442(a)(1) "is not 'narrow' or 'limited,'" *Willingham*, 395 U.S. at 406 (quoting *Colorado v. Symes*, 286 U.S. 510, 517 (1932)), and this Court has repeatedly rejected "a 'narrow, grudging interpretation' of the statute." *Jefferson County v. Acker*,

527 U.S. 423, 431 (1999) (quoting *Willingham*, 395 U.S. at 407); *accord Arizona v. Manypenny*, 451 U.S. 232, 242 (1981). The statute's liberal interpretation thus stands in contrast to other removal provisions, such as 28 U.S.C. § 1441 (permitting removal based on diversity of citizenship or the existence of a federal question), which sometimes has been afforded a "strict construction." *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941); *see also Jefferson County*, 527 U.S. at 430-31.

Applying the rule of liberal interpretation to § 1442(a)(1)'s requirement that removal be available to federal authorities sued "for any act under color of [their] office" (28 U.S.C. § 1442(a)(1)), the Court has said: "At the very least, [the statute] . . . is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Willingham*, 395 U.S. at 406-07 (citation omitted). Indeed, "'one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.'" *Jefferson County*, 527 U.S. at 431 (quoting *Willingham*, 395 U.S. at 407)).

Also consistent with § 1442(a)(1)'s broad scope, and especially pertinent for the question in this case, is the courts' interpretation of the statutory language authorizing removal by "any officer (*or any person acting under that officer*) of the United States or of any agency thereof." 28 U.S.C. § 1442(a)(1) (emphasis added). Applying that language, the courts universally have held that "the reach of section 1442(a)(1) extends to *private* persons." *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989) (emphasis added). Hence, "[a]lthough the primary beneficiaries of § 1442(a) are federal officers and agencies, a private party may also invoke the statute." *Parks v. Guidant Corp.*, 402 F. Supp. 2d 964, 967 (N.D. Ind. 2005). The statute "clearly contemplates that a private actor can claim its protection when it is threatened with liability for

actions taken on behalf of a federal officer." *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 845 (N.D. W. Va. 2004).[2]

The extension of § 1442(a)(1)'s removal authority to private persons makes good sense in light of the increasing frequency with which the government must use private means to accomplish its objectives. "The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions . . . ." *Barr v. Matteo*, 360 U.S. 564, 573 (1959). That includes delegation to, for instance, "'officers of lower rank in the executive hierarchy' or . . . private contractors." *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 73 (2d Cir. 1998). No less than federal officers and agencies, private persons to whom the government has delegated its functions should be entitled, where their "official duties" are questioned under state law, to "a trial upon the merits of the state-law question free from local interests or prejudice." *Arizona v. Manypenny*, 451 U.S. at 241, 242.

II. GOVERNMENT CONTRACTORS ACTING PURSUANT TO SPECIFIC GOVERNMENT DIRECTIVES QUALIFY FOR REMOVAL UNDER § 1442(a)(1)

Section 1442(a)(1)'s operative language with respect to removal by private persons focuses the inquiry on whether the party is "acting under" a federal officer or agency.

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[2] *Accord Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 418 (5th Cir. 2001); *Greene v. Citigroup, Inc.*, 2000 U.S. App. LEXIS 11350, at *6 (10th Cir. May 19, 2000); *Winters*, 149 F.3d at 398; *California v. H&H Ship Serv. Co.*, 1995 U.S. App. LEXIS 30986, at *4-*5 (9th Cir. Oct. 17, 1995); *Venezia v. Robinson*, 16 F.3d 209, 212 (7th Cir. 1994); *Camacho*, 868 F.2d at 487; *Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co.*, 644 F.2d 1310, 1313 (9th Cir. 1981); *Noble v. Employers Ins. of Wausau*, 555 F.2d 1257, 1259 (5th Cir. 1977); *Peterson*, 508 F.2d at 58; *Hazen v. S. Hills Nat'l Bank*, 414 F.2d 778, 779 (10th Cir. 1969); *Texas ex rel. Falkner v. Nat'l Bank of Commerce*, 290 F.2d 229, 230 (5th Cir. 1961).

Following from that language, the widespread rule is that removal is available to private parties "who act *under the direction of* federal officers." *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989) (emphasis added); *accord Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 399 (5th Cir. 1998); *Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*, 358 F. Supp. 841, 844 (S.D.N.Y. 1973).

There so far, however, has been "no precise standard for the extent of control necessary to bring . . . [a private] individual with[in] the 'acting under' clause." *Gurda Farms*, 358 F. Supp. at 844. As one district court has put it: "The number and complexity of federal institutions and programs would render impossible the formulation of such a standard. What it comes down to is that the court in each case must ascertain to what extent defendants act under federal direction and to what extent as independent agents." *Id.*

Though no precise formulation exists for determining when a private party acts sufficiently under the direction of a federal officer to invoke § 1442(a)(1), the courts have coalesced around certain principles. One is that a government contractor acting pursuant to specific instructions imposed by the government may remove a state court suit in which it is sued for its actions pursuant to those instructions. Several decisions prove the point. For instance, in *Winters*, the plaintiff sued a manufacturer of Agent Orange, alleging under state law that the product was defective and cancer-causing. The Fifth Circuit upheld the manufacturer's removal of the case to federal court under § 1442(a)(1). Reviewing the evidence, the court was "convinced that the government's detailed specifications concerning the make-up, packaging, and delivery of Agent Orange, the compulsion to provide the product to the government's specifications, and the on-going supervision the government exercised over the formulation, packaging, and delivery of Agent Orange is all quite sufficient to

demonstrate that the defendants acted pursuant to federal direction." *Winters*, 149 F.3d at 399-400.

In *Akin v. Big Three Indus., Inc.*, 851 F. Supp. 819 (E.D. Tex. 1994), the "[p]laintiff allege[d] multiple adverse health affects resulting from work performed on jet engines manufactured for the United States Air Force." *Id.* at 821. The manufacturer performed the work pursuant to government contracts, and the court upheld the manufacturer's removal of the case from state court to federal court under § 1442(a)(1). "Plainly, when a government contractor builds a product pursuant to Air Force specifications and is later sued because compliance with those specifications allegedly causes personal injuries," § 1442(a)(1)'s "requirement is satisfied." *Akin*, 851 F. Supp. at 823-24.

In *Fung v. Abex Corp.*, 816 F. Supp. 569 (N.D. Cal. 1992), the plaintiffs brought a state court action for injuries resulting from exposure to asbestos while on naval ships "constructed by General Dynamics pursuant to federal contract." *Id.* at 571. Finding removal proper under § 1442(a)(1), the court said: the government "monitored General Dynamics' performance at all times and required the defendant to construct and repair the vessels in accordance with the applicable and approved specifications incorporated into the contracts"; "all contract supplies were subject to inspection, test, and approval by the government"; and "[t]he government also performed extensive dock and sea trials on the submarines prior to commission, to ensure complete conformity with design specifications." *Fung*, 816 F. Supp. at 572-73.

These decisions, and others like them, *see, e.g., Pack v. AC & S, Inc.*, 838 F. Supp. 1099 (D. Md. 1993); *Gulati v. Zuckerman*, 723 F. Supp. 353 (E.D. Pa. 1989), set forth the established rule that, under § 1442(a)(1), "removal is proper when the lawsuit arises out of actions taken by a government contractor at the direction of a federal officer." *Akin*, 851 F.

Supp. at 823. In such instances, the government "exercise[s] 'direct and detailed' control" over the private actions at issue, satisfying "the 'acting under' requirement of § 1442(a)(1)." *Fung*, 816 F. Supp. at 573 (quoting *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 947 (E.D.N.Y. 1992)).[3]

III. PRIVATE PARTIES ADMINISTERING FEDERAL PROGRAMS ENJOY ESPECIALLY BROAD REMOVAL RIGHTS UNDER § 1442(a)(1)

Another point of consensus among the courts is that private entities assisting in the administration of federal programs, particularly federal health benefits programs, may remove state court actions under § 1442(a)(1) when sued for actions falling within their official functions. These cases

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[3] Courts also now agree that the term "person" in § 1442(a)(1) does not refer simply to private individuals, but also to private corporations. *See, e.g.*, *Winters*, 149 F.3d at 398; *Camacho*, 868 F.2d at 486; *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 844 (N.D. W. Va. 2004); *Thompson v. Community Ins. Co.*, 1999 U.S. Dist. LEXIS 21725, at *9 (S.D. Ohio Mar. 3, 1999). After this Court's decision in *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991), where the Court in reviewing a predecessor to the current § 1442(a)(1) found that the statute permitted removal by individual federal officers but not agencies, a few courts read "person acting under" a federal officer to embody a similar principle excluding collective entities as opposed to individuals. *See Arnold v. Blue Cross & Blue Shield*, 973 F. Supp. 2d 726, 739 (S.D. Tex. 1997); *Krangel v. Crown*, 791 F. Supp. 1436, 1442 (S.D. Cal. 1992); *cf. Virden*, 304 F. Supp. at 844 (noting that the "majority position" was always that corporations could be "persons" under § 1442(a)(1)). In 1996, Congress enacted the current statutory language expressly providing agencies with a removal right, thereby "overrul[ing] the Supreme Court's ruling in 1991 that a federal officer, but not a federal agency, could effect removal pursuant to the statute." *Winters*, 149 F.3d at 397. Because § 1442(a)(1) in no manner currently evinces in any of its parts an intent to cover solely individuals, there should be no question that a corporation can be a person under § 1442(a)(1). *See* 1 U.S.C. § 1 ("[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise -- . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

contrast with the decisions authorizing removal for government contractors acting pursuant to direct and detailed governmental instructions, in that courts have allowed private parties administering government programs (who also typically are government contractors) to remove state court lawsuits even where there is no evidence that the government *specifically* directed the activities at issue. It is enough that the defendant's "relationship to the plaintiff 'derived solely from [his] official duties.'" *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1427-28 (11th Cir. 1996) (quoting *Willingham v. Morgan*, 395 U.S. 402, 409 (1969)).

To this effect, many courts have recognized that Medicare fiscal intermediaries and carriers responsible for, among other things, approving or denying Medicare claims are persons acting under federal officers for purposes of § 1442(a)(1). *E.g.*, *Peterson v. Blue Cross/Blue Shield of Tex.*, 508 F.2d 55, 58 (5th Cir. 1977); *Peterson v. Weinberger*, 508 F.2d 45, 51 (5th Cir. 1977); *Freeze v. Coastal Bend Foot Specialist*, 2006 U.S. Dist. LEXIS 87156, at *9 (S.D. Tex. Dec. 1, 2006); *Thompson v. Community Ins. Co.*, 1999 U.S. Dist. LEXIS 21725 (S.D. Ohio Mar. 3, 1999); *Pani v. Empire Blue Cross Blue Shield*, 1996 U.S. Dist. LEXIS 19054 (S.D.N.Y. Dec. 23, 1996); *Roberts v. Hay*, 1992 U.S. Dist. LEXIS 22720, at *22-*23 (N.D. Ala. June 9, 1992); *Neurological Assocs. v. Blue Cross/Blue Shield of Fla., Inc.*, 632 F. Supp. 1078, 1080 (S.D. Fla. 1986); *Group Health Inc. v. Blue Cross Ass'n*, 587 F. Supp. 887, 890-91 (S.D.N.Y. 1984); *Kuenstler v. Occidental Life Ins. Co.*, 292 F. Supp. 532, 534-35 (C.D. Cal. 1968); *Allen v. Allen*, 291 F. Supp. 312, 314 (S.D. Iowa 1968). The decisions in *Thompson*, *Group Health Inc.*, and *Pani* are particularly instructive as to the breadth of the private party's removal rights.

In *Thompson*, the defendant was a health maintenance organization ("HMO") under contract with the Health Care Financing Administration ("HCFA"), the predecessor of the

Centers for Medicare and Medicaid Services; under the contract, the HMO was responsible for processing Medicare claims and reimbursing service providers. When the HMO elected to reduce its service area, enrollees brought suit in state court, and the HMO removed the case to federal court under § 1442(a)(1). The court denied a motion to remand, noting that the HMO's contracts with the enrollees were "a product of the federal government delegating its administrative obligations to the Defendant." *Thompson*, 1999 U.S. Dist. LEXIS 21725, at *12-*13. The court noted that "Defendant's relationship with the Plaintiffs was governed, from its inception through its ultimate termination, by a multitude of contractual, administrative, and statutory regulations" imposed by HCFA. *Id.* Though the HMO's service-area reduction was not "pursuant to a direct order" of HCFA, the HMO's actions nonetheless were under the direction of a federal officer because the HMO was subject to "comprehensive and detailed regulations." *Id.* at *20.

In *Group Health, Inc.*, resting on § 1442(a)(1), the court denied a motion to remand even though the plaintiff alleged that the intermediary -- in denying reimbursement for medical services -- exceeded the scope of the authority delegated by the government:

> The actions of Blue Cross at issue here were taken in Blue Cross's role as fiscal intermediary. Those actions thus were taken under color of the office of the Secretary of HHS, regardless of whether Blue Cross's initial determination was right or wrong, negligently or properly given, and regardless of whether Blue Cross should have consulted with, or did consult, HHS before giving the advice.

Group Health, Inc., 587 F. Supp. at 891. Likewise, in *Pani*, the court recognized that Medicare fiscal intermediaries "act as agents" of the federal government, and do so even when

they act "negligently or exceed[] [their] authority under the Medicare Act." *Pani*, 1996 U.S. Dist. LEXIS 19054, at *4. The relevant question, the court held, is "whether Pani's relationship with Empire derived solely from the latter's official duties," and since it did, removal under § 1442(a)(1) was proper. *Id.*; *see generally Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60, 65 (1984) (treating Medicare intermediaries as government "agents").

Private entities administering other federal health benefits programs have enjoyed similarly broad removal rights under § 1442(a)(1). In *Holton v. Blue Cross and Blue Shield of South Carolina*, 56 F. Supp. 2d 1347 (M.D. Ala. 1999), the court upheld removal under § 1442(a)(1) by a carrier administering a CHAMPUS plan for dependents of military service personnel. The carrier "act[s] as an agent of the United States" in that capacity. *Id.* at 1351-52. And in *Alabama Dental Ass'n v. Blue Cross & Blue Shield of Alabama, Inc.*, 2007 U.S. Dist. LEXIS 685, at *25 (M.D. Ala. Jan. 3, 2007), the court found removal under § 1442(a)(1) proper in a suit against a carrier administering an FEHBP plan for federal employees and annuitants and their dependents. The court ruled that, because the defendant had contracted with the United States Office of Personnel Management ("OPM"), which "exercised supervisory authority over the claims process for providers who seek reimbursement" for services supplied to FEHBP enrollees, the defendant was "acting under" OPM: the agency had "delineated a specific administrative regime" for assessing claims, and the defendant acted in compliance with OPM's directives. *Id.* at *23-*25.

In each of these many instances, the expansive removal rights stem from the fact that the state court suits implicate substantial, continuing federal programs. "The insurers act as continuing conduits for government policy and the state court lawsuits had the potential to interfere with an ongoing federal program." *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 951 (E.D.N.Y. 1992). Treating them as persons acting

under the government for removal purposes therefore "is consistent with the statutory goal [in § 1442(a)(1)] . . . to prevent suits from inhibiting federal policy." *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 844 (N.D. W. Va. 2004). Even absent specific directions from the government on the particular matter at issue in the case, removal lies in these circumstances, for there is a "federal interest in the matter." *Willingham*, 395 U.S. at 406 (internal quotation marks omitted).

These decisions also comport with this Court's instruction that § 1442(a)(1) should be available to "enable[] the defendant to have the validity of his immunity defense adjudicated in a federal forum." *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981). Numerous courts have held that entities administering federal health benefits programs can assert the same official and sovereign immunities as the government itself, in light of their close relationship with the government and their delegated responsibilities. *E.g., Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 72-74, 1003-05 (2d Cir. 1998) (official immunity); *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000, 1003-05 (8th Cir. 1998) (official immunity); *Matranga v. Travelers Ins. Co.*, 563 F.2d 677 (5th Cir. 1977) (sovereign immunity); *Pine View Gardens, Inc. v. Mutual of Omaha Ins. Co.*, 485 F.2d 1073, 1074 (D.C. Cir. 1973) (sovereign immunity). Because the entities can invoke governmental immunities, whose litigation is at the heart of § 1442(a)(1), the statute should be readily available to them.

Finally, even outside of the arena of health benefits, the courts have liberally applied § 1442(a)(1) if the private parties were engaged in the administration of an on-going federal grogram. *E.g., Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*, 358 F. Supp. 841, 844-45 (S.D.N.Y. 1985) (federal program for providing legal services to indigent migrant workers); *Dixon v. Georgia Indigent Legal Services, Inc.*, 388 F. Supp. 1156, 1162 (S.D. Ga. 1974) (same); *Oregon v. Cameron*, 290 F. Supp. 36, 37 (D. Or.

1968) (program establishing Volunteers In Service To America (VISTA)); *see also Texas ex rel. Falkner v. Nat'l Bank of Commerce*, 290 F.2d 229 (5th Cir. 1961) (program establishing banks on military bases); *First Nat'l Bank v. Bank of Bellevue*, 341 F. Supp. 960 (D. Neb. 1972) (same).

IV. THE COURT'S STANDARD FOR REMOVAL BY A PRIVATE PARTY UNDER § 1442(a)(1) SHOULD EMBRACE GOVERNMENT CONTRACTORS ACTING UNDER SPECIFIC DIRECTIONS AND ENTITIES ADMINISTERING FEDERAL PROGRAMS

The Respondents in this case (*i.e.*, the defendant in the underlying action who invoked § 1442(a)(1)) is neither a government contractor acting pursuant to specific directions nor a party administering an on-going federal program. Instead, it falls on the continuum further afield from government involvement, where the private party, in the Eighth Circuit's view, participated in a heavily regulated industry and acted pursuant to "comprehensive, detailed regulation[s]." *Watson v. Philip Morris Cos.*, 420 F.3d 852, 857 (8th Cir. 2005).

BCBSA takes no position on whether § 1442(a)(1) extends to Respondents' situation. But insofar as the Court must, in resolving this case, address the circumstances under which a private party is a "person acting under" a federal officer or agency, the Court should establish a standard broad enough to encompass government contractors implementing government specifications and entities (including contractors) who administer continuing federal programs. "If the [private] actor is effectively an agent or employee of the government because its activities are controlled and funded by the government, it is entitled to the same jurisdictional protection as the government itself." *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 846 (N.D. W. Va. 2004); *accord Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (private actors "so

intimately involved with government functions as to occupy essentially the position of an employee of the government" may remove under § 1442(a)(1)).

The decisions permitting government contractors and entities administering federal programs to remove state court actions pursuant to § 1442(a)(1) are legion and span many decades; they are well-reasoned; and Congress necessarily was aware of the decisions when it amended the statute in 1996 but did not alter the language regarding "person[s] acting under" federal officers and agencies. The Court should incorporate the reasoning and results of these precedents into any standard it formulates for removal by persons acting under federal authorities. In the end, "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum," and extending § 1442(a)(1) to government contractors acting pursuant to the government's specific directives and to parties administering the government's on-going programs is in full accord with Congress's intention. *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969).

CONCLUSION

The Court should formulate a standard under § 1442(a)(1) that, at a minimum, allows for removal by government contractors acting pursuant to specific government directives and by government contractors and other private entities administering federal programs.

Respectfully submitted,

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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE THE CAMPAIGN FOR TOBACCO-FREE KIDS, THE AMERICAN LUNG ASSOCIATION, THE AMERICAN HEART ASSOCIATION, THE AMERICAN CANCER SOCIETY AND THE AMERICAN LEGACY FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a cigarette manufacturer, while profiting from its marketing and sale of "light" cigarettes to the general public, is entitled to have cases brought against it entirely under state law removed to federal court pursuant to 28 U.S.C. § 1442(a)(1).

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INTEREST OF *AMICI CURIAE*[1]

The Campaign for Tobacco-Free Kids, the American Lung Association, the American Heart Association, the American Cancer Society and the American Legacy Foundation submit this brief as *amici curiae* in support of Petitioners Lisa Watson and Loretta Lawson.

The Campaign for Tobacco-Free Kids is a 501(c)(3) nonprofit organization that works to promote public and private policies to prevent and reduce tobacco use and its harms, especially among children. The Campaign for Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing tobacco use and its harms among children and others.

The American Lung Association ("ALA") is one of the nation's oldest voluntary health organizations, with volunteers and affiliates in all 50 states, the District of Columbia and Puerto Rico. ALA has nearly 400,000 volunteers. Since cigarette smoking is a major cause of chronic obstructive lung disease, ALA has long been active in research, education and public policy advocacy on the adverse health effects of tobacco

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[1] Pursuant to Rule 37.6, *amici curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amici curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

products. ALA has advocated for the regulation of tobacco products for more than two decades.

The American Heart Association ("AHA") is a nonprofit, voluntary health organization with nearly 2,000 community organizations in all 50 states, the District of Columbia and Puerto Rico. AHA's mission is to reduce disability and death from cardiovascular diseases and stroke, including those caused by or exacerbated by cigarette smoking. AHA has a long and active history before Congress and regulatory agencies on tobacco and health-related matters and has petitioned the FDA on several occasions seeking regulation of cigarettes and other tobacco products under the Food, Drug, and Cosmetic Act.

The American Cancer Society, Inc. ("ACS") is the nationwide community-based public health organization with three million volunteers dedicated to eliminating cancer as a major health problem through research, advocacy, education and service. Research conducted and supported by ACS since the 1950s has played a pivotal role in identifying the use of tobacco products as a major cause of cancer.

The American Legacy Foundation is dedicated to building a world where young people reject tobacco and anyone can quit. The foundation was established in March 1999 as a result of the Master Settlement Agreement reached between the attorneys general in 46 states and five U.S. territories and the tobacco industry. The foundation develops programs that address the health effects of tobacco use through grants, technical assistance and training, youth activism, strategic partnerships, counter-marketing and grass roots

marketing campaigns, research, public relations and outreach to populations disproportionately affected by the toll of tobacco.

Together, *amici* have been in the vanguard of the public health community's efforts to develop and disseminate accurate and truthful information regarding the health hazards posed by smoking. *Amici* seek to disabuse the American public of the widely-held misconception that smoking "light" or "low tar" cigarettes represents a safer alternative to smoking regular cigarettes – a misconception that Philip Morris and other tobacco companies perpetuate to this day through their marketing and advertising practices in order to maintain and expand their consumer base.

Based on their combined expertise and interest in the subject matter, *amici* respectfully submit this brief to offer guidance regarding the issue before this Court: whether the Federal Trade Commission ("FTC") has exerted such comprehensive regulatory control over tobacco companies' marketing of so-called "light" cigarettes that Philip Morris may qualify as a "person acting under a federal officer" for the purpose of the federal officer removal statute, 28 U.S.C. § 1442(a)(1).

SUMMARY OF ARGUMENT

Philip Morris is not entitled to remove a state law action filed in state court pursuant to the federal officer removal statute, 28 U.S.C. § 1442(a)(1), under the Eighth Circuit's test or any other standard that ascribes weight to the comprehensiveness and detail of federal control. Philip Morris has *voluntarily* marketed Marlboro Lights and Cambridge Light cigarettes as

either "light" or "lowered in tar and nicotine" in a manner not subject to FTC control. In fact, Philip Morris on its own chose the "light" descriptor for its products based upon "Cambridge Filter Method" ("Cambridge Method") test results despite knowing that these results were misleading the FTC and consumers. The Eighth Circuit erred in construing the applicable facts and, as a result, misapplied the law. A review of the history of the development and marketing of cigarettes with such descriptors as "light" or "lowered in tar or nicotine" and of the FTC's attention to the issue invariably leads to the conclusion that the FTC does not regulate, let alone control, the use of any of the descriptors at issue in this case.

The FTC's lack of regulation in this area and the FTC's lack of authority to enforce any particular standard for the use of descriptors, as evidenced by Philip Morris's own recent petition to the FTC to undertake such regulation, indicate that there has been no federal direction, let alone a colorable federal defense to the underlying claim. This action was removed to federal court erroneously and this Court, accordingly, should reverse.

ARGUMENT

The Court of Appeals for the Eighth Circuit held that a private actor may qualify as a "person acting under a federal officer" for the purpose of the federal officer removal statute, 28 U.S.C. § 1442(a)(1), when the actor is "comprehensively regulated" by a federal agency. It then seriously erred in applying its own standard to the historical record, concluding that the FTC controls or directs Philip Morris's marketing of

Marlboro Lights as "light" and "lowered in tar and nicotine."

I. The History of "Light" Cigarettes and the FTC's Regulatory Response to their Marketing and Advertising Support the Conclusion That the FTC Does Not Control Or Direct Such Practices.

The FTC has neither compelled nor authorized Philip Morris to market its cigarettes as "light" or "lowered in tar or nicotine." Philip Morris voluntarily markets its cigarettes as "light," because this marketing of its cigarettes has proven highly profitable. The history of the development and marketing of cigarettes labeled as "light," "low tar," or "lowered in tar and nicotine," as well as the history of the FTC's quiescence in response to such marketing practices, requires the conclusion that in its marketing of its cigarettes Philip Morris "acted on its own." Brief for the United States as *Amicus Curiae* at 8-9, *Watson v. Philip Morris Cos., Inc.*, 420 F.3d 852 (8th Cir. 2005), *cert. granted*, -- U.S. --, 2007 WL 80665 (U.S. Jan. 12, 2007) (No. 05-1284).

A. 1950-1970: Early FTC attempts to regulate tobacco advertising

The illusory quest to develop and market a "safer" cigarette began after epidemiological studies in the 1950s established an increased risk of lung cancer among cigarette smokers. Widespread public dissemination of the results of these studies led to what the tobacco industry called a "health scare," as consumers became increasingly aware of the health risks associated with smoking. National Cancer

Institute, *Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, at 199 (2001) ("Monograph 13"), available at http://cancercontrol.cancer.gov/tcrb/monographs/13/. To appeal to increasingly health-conscious consumers, tobacco companies developed filtered cigarettes, which initially were marketed as containing explicit health benefits. *Id.*

The FTC, whose authority under Section 5(a)(1) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45 (a)(1), is to prevent "unfair or deceptive acts or practices in or affecting commerce," including tobacco advertising, became alarmed that tobacco companies' advertising claims were inaccurate and misleading. *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985). In 1955, the FTC advised tobacco companies not to make representations about the tar and nicotine levels of their cigarettes. *Id.*

The 1964 Surgeon General Report, which established cigarette smoking as a cause of lung cancer, at least in males, further increased public awareness of the health risks associated with smoking. The report also galvanized the tobacco industry, including Philip Morris, which recognized that its continued profitability rested on marketing cigarettes that assuaged health concerns but continued to deliver sufficient amounts of nicotine when smoked. Monograph 13 at 206.

In spite of the 1955 FTC advisory, tobacco companies aggressively marketed their cigarettes as having less tar than competitors', resulting in what the tobacco industry referred to as the "tar derby" or "tar

wars." In 1966, the FTC issued a policy statement indicating that a factual statement of the tar and nicotine content based upon the Cambridge Method would not be treated as deceptive as long as there were no express or implied representations in advertisements that the represented level of tar or nicotine reduced or eliminated health hazards. Cigarette Advertising Guides, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (Sept. 22, 1955).[2]

The Cambridge Method is a machine measurement of cigarette tar and nicotine yields that does not attempt to replicate the amount of tar and nicotine actually inhaled by human smokers, which itself varies based upon an individual's personal smoking behavior. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d. 1, 2006 WL 2380648, at *183-*84 (D.D.C. 2006). The Method "utilizes a smoking machine that takes a 35 milliliter puff of two seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length. The tar and nicotine collected by the machine is then weighed and measured." *Brown & Williamson*, 778 F.2d at 37.

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[2] Such policy statements are not formally promulgated as a substantive rule with a public comment period. Therefore, they lack the force and effect of law, and merely advise how an agency believes it will exercise a discretionary power. As such, they are neither rules nor regulations. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31, 315-16 (1979); *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 809 (2003) (stating that policy statements inform the public of an agency's views but do not create legal rights or obligations).

The FTC believed that the Cambridge Method "provide[d] smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands." 62 Fed. Reg. 48,158 (1997). In 1970, it initiated formal rulemaking proceedings to require tobacco manufacturers to disclose the tar and nicotine yields as determined by the Cambridge Method test.[3] 35 Fed. Reg. 12,671 (1970). However, the FTC never completed the rulemaking process. Instead, five major tobacco companies, including Defendant Philip Morris, as well as three minor producers, entered into a private, voluntary agreement to disclose Cambridge Method test data in cigarette advertisements.[4] The companies

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[3] The FTC exercises its authority under sections 5 and 13 of the FTC Act in two ways. First, the FTC may promulgate trade regulation rules that apply to an entire industry by publishing the proposed rule, soliciting public comment, and ultimately submitting the proposed rule to a formal vote of the FTC commissioners. 15 U.S.C. § 57b-3; 16 C.F.R. 1.7-1.20. Second, the FTC may bring an administrative or judicial enforcement action. 15 U.S.C. §§ 45, 53; *see* 16 C.F.R. 3.1, et seq. Such actions are frequently resolved through negotiated consent agreements between the FTC and the targeted member of industry. *See* 16 C.F.R. 3.25.

[4] There is no record evidence that Philip Morris ever included tar and nicotine ratings on the packages of either Marlboro Lights or Cambridge Light while representing these cigarettes to be "light" or delivering "lowered tar and nicotine" on its packaging. Actually, Philip Morris has admitted that it never included tar and nicotine ratings on these "light" cigarette packages. See *Aspinall v. Philip Morris, Companies*, Inc., No. 98-6002, 2006 WL 2971490 at *8 (Mass.Sup.Ct. Aug. 9, 2006)

entered into this voluntary agreement in order to avoid FTC regulation of their cigarette advertising. *Philip Morris USA*, 449 F. Supp. 2d. 1, 2006 WL 2380648, at *183. This private agreement prompted the FTC to end its formal rulemaking proceedings. 36 Fed. Reg. 784 (1971); 62 Fed. Reg. 48,158 (1997). Notably, the FTC was not a party to the agreement and, as a result, it never established the agreement's terms as a "Trade Regulation Rule" pursuant to 15 U.S.C. § 57a. Thus, it did not have the authority to enforce the agreement. *See Brown & Williamson Tobacco Corp.*, 778 F.2d at 37.

B. 1971-1996: A mushrooming "light" tobacco industry in the dawn of an unregulated era

In 1971, Philip Morris introduced Marlboro Lights cigarettes nationwide as "light," while including the phrase "lowered in tar and nicotine" on all of its packaging.

Nevertheless, as early as the 1970s, Philip Morris internally recognized, based upon its sophisticated understanding of cigarette design and smoker compensation, that "low tar" or "light" cigarettes offered no clear health benefit. *Philip Morris USA*, 449 F. Supp. 2d. 1, 2006 WL 2380632, at *205-*07. While Philip Morris kept this information secret, it continued selling Marlboro Lights as "light" and "lowered in tar and nicotine" and publicly defended the Cambridge Method as a useful means of measuring tar and nicotine yields in "light" cigarettes.

1. Philip Morris's internal documents reveal that "[b]y 1978, Philip Morris had substantial evidence that

'filter dilution [which Philip Morris used to reduce tar and nicotine yields when testing by the Cambridge Method] was somehow acting to increase' the biological 'activity' of the whole smoke condensate ("WSC") collected from its cigarettes," *id.* at *206 - actually indicating that these "light" cigarettes were potentially more hazardous than regular cigarettes. Indeed, Dr. William Farone, who was the Director of Applied Research at Philip Morris from 1977 to 1984, has testified that:

> [I]n the case of Marlboro Lights, the Philip Morris test data that I have reviewed on that level of dilution for equivalent blends indicated that the product design for their Light cigarettes was more mutagenic than the full flavor Marlboro, Marlboro Reds, and therefore predictive of more potential cancer risk. These studies were repeated multiple times over the past 20 years and continue to be repeated to this day. The Philip Morris data, as was used by Philip Morris, was a strong warning that their product design change between a Marlboro Red and a Marlboro Light - increased ventilation - resulted in a potentially more dangerous product.

Id. at *205. Dr. Farone has further testified that Philip Morris has not "changed the design of [Marlboro] 'Lights' cigarettes in response to its studies and knowledge concerning mutagenicity." *Id.*

Philip Morris was aware, as early as 1975, that, due to compensation, smokers got as much tar and

nicotine from Marlboro Lights as from regular Marlboros:

> Marlboro Lights cigarettes were not smoked like regular Marlboros. There were differences in the size and frequency of the puffs, with larger volumes taken on Marlboro Lights by both regular Marlboro Smokers and Marlboro Lights smokers.... The panelists smoked the cigarettes according to physical properties; i.e., the dilution and the lower RTD of Marlboro Lights caused the smokers to take larger puffs on that cigarette than on Marlboro 85's. The larger puffs, in turn, increased the delivery of Marlboro lights proportionally. In effect, the Marlboro 85 smokers in this study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery.

Id. at *216.

Nevertheless, Philip Morris continued to market Marlboro Lights as "light" and "lowered in tar and nicotine." James Morgan, former CEO of Philip Morris, testified that "Philip Morris made a calculated decision to use the phrase 'lower tar and nicotine' even though its own marketing research indicated that consumers interpreted that phrase as meaning that the cigarettes not only contained comparatively less tar and nicotine, but also that they were a healthier option." *Philip Morris USA*, 449 F. Supp. 2d. 1, 2006 WL 2381449, at *34.

2. During this period, the FTC took no regulatory action regarding "light" cigarette advertising; nor did it take any regulatory action based on the Cambridge Method.

In the early 1980s, at the behest of defendant Philip Morris and fellow manufacturer R.J. Reynolds, the FTC sought an injunction in federal district court to stop Brown & Williamson from using the Cambridge Method to substantiate its claim that Barclay cigarettes yielded 1 mg of tar, because, according to the FTC, Barclay cigarettes had been designed to fool the Cambridge Method test. *Brown & Williamson*, 778 F.2d at 37. The injunction sought also would have forced Brown & Williamson to modify the standard Cambridge Method testing procedure to one that the FTC devised just for Barclay cigarettes. Although the D.C. Circuit concluded that Brown & Williamson's claims about the amount of tar and nicotine were deceptive and had to cease, it found, in an opinion by Judge Bork, that the FTC could not dictate how cigarettes are tested. *Id.* at 42. The court explained that to grant the requested injunction would "enshrine the current FTC system [Cambridge method] as the sole legitimate testing method, even though it was not passed pursuant to section 18 of the FTC Act, 15 U.S.C. § 57a (1982), and subjected to the possibility of judicial review." *Id.* Absent the use of such procedures, the court held that the FTC lacks the authority to require any particular tar and nicotine rating system. *Id.* The D.C. Circuit invited the FTC to "address the problem by promulgating a Trade Regulation Rule under section 18 of the Act." *Id.* To date, the FTC has not done so.

In fact, rather than promulgate a trade regulation rule "enshrining" the Cambridge Method, the FTC ceased conducting its own testing of "light" cigarettes in 1987, closing its laboratory. 62 Fed. Reg. at 48,158. The Tobacco Institute Testing Lab, an organization funded by major tobacco companies, took over the role of conducting the Cambridge Method tests after that, submitting the data to the FTC. *Id.* at 48,158, n.5.

The prevailing view within the public health and scientific communities in the 1970s and 1980s was that the Cambridge Method test data provided useful information to smokers who sought to compare the tar and nicotine yields of cigarettes. While a few members of the public health community questioned the usefulness of the data, because it did not reflect actual tar and nicotine yields, the FTC and the United States Surgeon General remained of the view that the data provided the ability to make useful comparisons between competing brands.

Based on the scientific evidence available to them, unlike the information available to tobacco manufacturers, public health authorities believed that a cigarette yielding less tar in the Cambridge Method tests would be likely to produce less cancer as well. Monograph 13 at 2. For example, in 1981, the United States Surgeon General recommended that smokers who could not quit were well advised to switch to "light" cigarettes. U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette, A Report of the Surgeon General* (1981), available at http://www.cdc.gov/tobacco/sgr/sgr_1981/index.htm.

3. Philip Morris, on the other hand, had special knowledge of the Cambridge Method's limitations, in part because it had developed an alternative testing machine, the human smoke simulator, that could test for actual smoker nicotine and tar yields. A Philip Morris document dated September 17, 1975, from Goodman to Leo F. Meyer, the Philip Morris Director of Research, reflects the depth of Philip Morris's knowledge. As Dr. David M. Burns, an author of the 1981 Surgeon General's Report, has explained:

> [T]here are three things that are powerfully significant in this document: (1) It "very clearly demonstrates that, in contrast to what we believed six years later when we wrote the 1981 Surgeon General's Report, smokers who smoked brands of cigarettes on the market in 1975 were not getting different yields when they smoked those products. We [in the public health community] believed they were." (2) "[T]his is dated 1975, six years prior to the time the [1981] Surgeon General's Report reached its conclusion. And we did not have access to this information or comparable information." (3) "[T]his study was done on a machine that mimicked actual smoking behaviors, that actually matched the behavior of the individual when the machine smoked the cigarette. In 1981, one of the recommendations that we made . . . was that this type of machine should be developed so that we could develop a better understanding of the relationship

> between delivery of tar and nicotine of these cigarettes when they were actually smoked. So . . . six years prior to the time we were reviewing that evidence for the Surgeon General, this information was available to Philip Morris."

Philip Morris USA, 2006 WL 2380648, at *216. Dr. Burns further testified, "Had that information been available to us, we would not have then offered the recommendation to the population of the United States that it would be a good idea to shift to these products." *Id.* at *193.

Philip Morris also internally recognized that the Cambridge Method data from its line of "light" cigarettes, which were designed with dilution filters, was false and misleading. A Philip Morris document dated August 11, 1967, from Helmut Wakeham, Vice President of Corporate Research and Development, to Paul D. Smith, Vice President and General Counsel, recognized that human smokers increased their smoke intake when switching from non-filter to filter cigarettes:

> Two tests conducted at Product Opinion Laboratories demonstrate that in smoking a dilution filter cigaret [sic], the smoker adjusts his puff to receive about the same amount of "undiluted" smoke in each case. . . . In the smoking machine the puff volume is constant so that with dilution the quantity of "equivalent undiluted smoke" delivered to the Cambridge filter is reduced. Not so with the human

> smoker who appears to adjust to the diluted smoke by taking a larger puff so that he still gets about the same amount of equivalent undiluted smoke. . . . The smoker is, thus, apparently defeating the purpose of dilution to give him less "smoke" per puff. He is certainly not performing like the standard smoking machine; and to this extent the smoking machine data appear to be erroneous and misleading. It has probably always been so for diluted smoke cigarettes, whether dilution is obtained by porous paper or holes in the filter.

Id. at *212. Philip Morris's own scientist, Dr. Jerry Whidby, has testified that "Product Opinion Laboratories was a facility established by Philip Morris to evaluate smokers' reaction to the cigarette brands Philip Morris was selling, as well as to Philip Morris' prototype cigarettes," and that he was not "aware of any instance, at any time between when Dr. Wakeham wrote this document in 1967 and when [Dr. Whidby] left the company in 1998, in which Philip Morris informed the American public directly of Wakeham's conclusions that the FTC tar and nicotine yields are apparently 'erroneous and misleading,'" and "dilution filter cigarettes generated lower FTC yields than non-dilution cigarettes, but delivered about the same amount of smoke to smokers." *Id.* (citing Dr. Jerry Whidby Dep.).

Dr. Farone has testified to the extraordinary significance of Mr. Wakeham's statements in this document:

> It shows that Philip Morris understood the puff compensation phenomenon. This document shows that by 1967, Philip Morris recognized that when you have dilution or ventilation, the mechanism for compensation is puff adjustment . . . this document [also] shows that Philip Morris knew in 1967 that human smokers compensated by increasing their smoke intake when switching from non-filter to filter cigarettes, and in doing so, smokers received the same amount of tar and nicotine from their filter cigarettes as from non-filter cigarettes. It also shows Wakeham's understanding that the FTC tar and nicotine yields for low tar cigarettes are erroneous and misleading.

Id.

C. 1997-Present: FTC reconsiders but does not adopt regulations governing "light" cigarettes as the United States prosecutes industry members for deceptive marketing practices related to "light" cigarettes

Beginning in the late 1990s, the public health authorities made several advances in their understanding of smoker compensation and cigarette design. These advances were made possible largely as a result of the availability for review of a large number of internal industry documents, including research reports, subsequent to litigation brought against the tobacco companies. *See* Monograph 13 at i-ii. Much of

this information is detailed in the National Cancer Institute's Monograph 13, which further came to the conclusion that "[w]idespread adoption of lower yield cigarettes in the United States has not prevented the sustained increase in lung cancer among older smokers." Monograph 13 at 10. The report then concluded that:

> [m]easurements of tar and nicotine yields using the FTC method do not offer smokers meaningful information on the amount of tar and nicotine they will receive from a cigarette. The measurements also do not offer meaningful information on the relative amounts of tar and nicotine exposure likely to be received from smoking different brands of cigarettes.

Id.

In 1997, the FTC solicited public comment on whether it should regulate descriptors such as "light" or "low tar." 62 Fed. Reg. at 48,163. The FTC stated in its request that "[t]here are *no* official definitions" for terms such as "low tar," "light," or "ultra light," but explained that "they appear to be used *by the industry* to reflect ranges of FTC tar ratings." *Id.* (emphasis added). The FTC ultimately did not take any regulatory action in this area.

In 1999, the United States brought suit in federal district court under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, against Philip Morris and tobacco-related entities,

several of whom were signatories to the 1971 voluntary agreement. With respect to Philip Morris, the United States alleged, in part, that it had engaged in a decades-long unlawful conspiracy to deceive the American public about the health benefits derived from smoking low tar, "light" cigarettes. *Philip Morris USA*, 449 F. Supp. 2d. 1, 2006 WL 2380632, at *1.

As the Government's RICO suit proceeded, Philip Morris petitioned the FTC in 2002 to promulgate a trade rule that would require tobacco companies: (1) to disclose the average tar and nicotine yields of cigarette brands; (2) to define and regulate the use of descriptors such as "light" and "ultra light;" and (3) to mandate the use of disclaimers with respect to the average tar yield and the health effects of low-yield cigarettes. Petition for Rulemaking Preliminary Statement 1, 32-35 (FTC filed Sept. 18, 2002). That petition was never acted upon by the FTC.

In August 2006, following more than two years of discovery and a trial at which countless scientists, government officials, and tobacco industry members testified, the federal district court held that Philip Morris had falsely marketed and continues to falsely market "light" cigarettes through its use of the descriptor "light" in violation of RICO. The court enjoined Philip Morris from using descriptors such as "light" in cigarette advertising. *Philip Morris USA*, 449 F. Supp. 2d. 1, 2006 WL 2380681, at *1:

> "[T]he only way to restrain Defendants from their longstanding and continuing fraudulent efforts to deceive smokers, potential smokers, and the American

> public about 'light' and 'low tar' cigarettes is to prohibit them from using any descriptor which conveys a health message. . . . By using descriptors such as 'lights' and 'low tar,' Defendants knowingly convey the false impression that cigarettes with those labels are less harmful than other cigarettes. Consumers' false belief is so pervasive and longstanding, and has been exploited and promoted by Defendants for so long, that preventing and restraining Defendants' future fraud requires a ban on any future use of descriptors which convey a health message."[5]

Id., 2006 WL 2380650, at *222.

II. The Eighth Circuit's View of the Applicable History is Erroneous

Although the Eighth Circuit was correct in recognizing that no FTC rule or regulation governs Philip Morris's use of "light" or other such descriptors in advertising, it was clearly erroneous in its conclusion that the FTC comprehensively controls Philip Morris's "light" cigarette marketing practices.

The Eighth Circuit erred in treating the 1971 voluntary agreement among select tobacco industry members as equivalent to an FTC regulation carrying the force and effect of law. The FTC, which was not a

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[5] The U.S. Court of Appeals for the District of Columbia has stayed that injunction pending an appeal.

party to that agreement, has no authority to enforce the agreement. *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d at 37. As the court in *Brown & Williamson Tobacco Corp.* explained, because the "FTC had not adopted [the Cambridge Method] of testing pursuant to a Trade Regulation Rule . . . one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette." *Id.* at 36, 44.

Even if it were true that Philip Morris and other tobacco companies would not have agreed to report Cambridge Method data unless they felt compelled to do so, and had the FTC sought public comment on the proposed trade regulation rule, a private voluntary agreement would still not be enforceable by the FTC as an FTC regulatory requirement either against signatories to the agreement or non-signatories. The agreement, therefore, is not comparable to a trade regulation rule enacted pursuant to 15 U.S.C. § 57a, because it lacks the force and effect of law. *Id.* at 44. Moreover, there is no way to be certain that the FTC would have adopted the terms of the voluntary agreement if it had promulgated a trade regulation rule.

It is of no moment that the FTC once conducted testing pursuant to the Cambridge Method. Absent a rulemaking, the FTC lacks the authority to require any particular tar and nicotine rating system. *See id.*

2. The Eighth Circuit misconstrued the legal import of FTC reports to Congress, which on occasion have used the term "low tar" to refer to cigarettes measuring 15 milligrams or less in tar under the

Cambridge Method test. Such reports cannot establish a legally binding statement of an FTC regulatory position. [6] *See United States v. Anderson*, 82 F.3d 436 (D.C. Cir. 1996) (holding that a statement by the United States Sentencing Commission included in a special report to Congress was at most a policy statement). Only after following its applicable procedures may a federal agency affect the rights of individuals through regulation. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

Furthermore, FTC reports that have employed the term "low tar" or related descriptors have not purported to define these terms. The FTC has repeatedly assured Congress that it has never formally defined "'ultra-low tar,' or any term related to 'tar' level."[7] FTC, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act for the Year 1979*, 11 n.8 (undated). As recently as 1997, in its request for comments on whether it should define "light" cigarette descriptors, the FTC reiterated that "[t]here are no official definitions for these terms," and that these terms merely reflect industry usage. 62 Fed. Reg. 48,158, 48,163 (1997).

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[6] This purported "low tar" definition was *never* used in the context of any enforcement proceeding, formal rule, guide, or policy statement that indicated the FTC's view on the legality of the use of the representation in advertising.

[7] *Watson*, 420 F.3d at 860-861 cites the testimony of C. Lee Peeler, Deputy Director of the Bureau of Consumer Protection on FTC testing, but does not describe the fact that Mr. Peeler also testified that "the FTC has no official view on descriptors on cigarette packages, that it has sought information and data, and that it has not taken a position 'one way or the other.'" *Aspinall*, 2006 WL 2971490 at *4.

Finally, nothing more clearly evidences that the FTC has never defined the term "light" than the fact that Philip Morris in 2002 petitioned the FTC to do just that. *See* Petition for Rulemaking Preliminary Statement 1, 32-35 (FTC filed Sept. 18, 2002). As has been stated, that petition has never been acted upon.

3. Contrary to the opinion of the Eighth Circuit, the 1971 consent order between the FTC and American Brands does not and cannot evidence FTC control over the cigarette marketing practices of any other tobacco company, including Philip Morris. *See In re Am. Brands, Inc.*, 79 F.T.C. 255 (1971).

This Court has consistently held that consent orders or decrees are contracts that only bind the parties thereto, and that "any command of a consent decree or order must be found within its four corners, and not by reference to any purposes of the parties or of the underlying statutes." *United States v. ITT Cont'l Banking Co.*, 420 U.S. 223, 233 (1975) (internal quotation marks omitted). *See also California v. Am. Stores Co.*, 495 U.S. 271 (1990) (deciding merits of California's suit alleging that merger violated Clayton Act, which suit had been filed a day after the FTC had approved the proposed merger following American Stores Co.'s agreement to the terms of a consent order with the FTC); *see also Am. Stores Co. v. Comm'r of I.R.S.*, 114 T.C. 458 (Tax Ct. 2000) (holding that petitioner is not entitled to deduct the legal fees it incurred in contesting the State of California's antitrust suit, which was filed after American Stores had entered into a consent order with the FTC and the FTC had approved the merger at issue); *United States v. Armour & Co.*, 402 U.S. 673 (1971);

United States v. Atl. Ref. Co., 360 U.S. 19 (1959); *Hughes v. United States*, 342 U.S. 353 (1952).

Further, since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation. *ITT Cont'l Banking Co.*, 420 U.S. at 236-37; *see Atl. Ref. Co.*, 360 U.S. at 23 (rejecting the Government's argument that its interpretation of a consent order would better serve "the basic purpose of the Elkins and Interstate Commerce Acts that carriers are to treat all shippers alike," and explaining that, "[t]his may be true. But it does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues.").

Most importantly, because consent orders are contracts between the parties, they cannot bind non-parties. *Martin v. Wilks*, 490 U.S. 755, 762 (1989), *superseded by statute on other grounds in* The Civil Rights Act of 1991 (explaining that this "rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'"). *See also Am. Stores*, 495 U.S. at 271. It is undisputed that Philip Morris was not a party to this 1971 consent order. Therefore, this 1971 consent order can have no legal effect regarding whether Philip Morris is compelled or authorized to use the descriptors "light" and "lowered in tar and nicotine" in advertisements or on packaging.[8]

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[8] As a factual matter, the 1971 consent order merely prohibited American Brands from using the terms "low,"

CONCLUSION

Philip Morris is not entitled to federal officer removal under the Eighth Circuit's test or any standard that ascribes weight to the comprehensiveness and detail of federal control, because it voluntarily markets Cambridge Light cigarettes and Marlboro Lights as "light" or "lowered in tar and nicotine" in a manner not subject to FTC control or direction. This Court should reverse.

Respectfully submitted,

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"lower" or "reduced" tar unless accompanied by a disclosure of the tar and nicotine yields of the advertised cigarette; it did not define those terms and did not approve the use of those terms. *In re Am. Brands, Inc.*, 79 F.T.C. 255 (1971). Philip Morris's insistence that this consent order provides industry-wide guidance has no merit. The United States has stated that the "[1971] decree did not reflect an FTC position on the proper definition of low tar." Brief for United States at 9. Nor is Philip Morris's position even plausible, given that it petitioned the FTC to promulgate a regulation in 2002 on the basis that the use of these descriptors would provide guidance to the industry. Petition for Rulemaking Preliminary Statement 1, 32-35 (FTC, filed Sept. 18, 2002).

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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON, *et al.*,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE DEFENSE CONTRACTORS AND INDUSTRY ASSOCIATIONS IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE

Amici include current and former defense contractors and associations of defense contractors who produce, or have produced, equipment under contracts with the United States government for use by the United States Armed Forces.[1] (A complete list of amici is set forth in the appendix to this brief.) In producing such equipment, amici contractors and members of amici associations frequently operate (or have operated) in close conjunction with the federal government, especially with respect to the design of such equipment. Thus, if a tort action is brought against a defense contractor alleging that equipment it produced was negligently designed and that this defect caused injury, the defendant may be able to invoke what has been referred to as a "government-contractor defense," a principle of federal law that precludes a contractor's liability when the government has approved reasonably precise specifications for the equipment. *See Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988). Moreover, the lower courts have generally concluded that, in a situation where a contractor has a colorable government-contractor defense, the defendant may remove a case against it to federal court under 28 U.S.C. § 1442(a)(1), the provision at issue in this case, even if the complaint on its face does not raise a claim arising under federal law.

This particular case does not involve removal based on the government-contractor defense, and amici take no position on whether removal was proper in this case. Nonetheless, because the Eighth Circuit relied on (and, arguably, extended) the government-contractor defense cases to find removal proper in this case, this Court's decision may affect the ability of amici contractors or members of amici associa-

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[1] This brief was not authored in whole or in part by counsel for either party. No person other than amici and undersigned counsel made any monetary contribution to the preparation and submission of this brief. Letters consenting to the filing of this brief from both parties have been filed with the Clerk.

tions to remove to federal court cases filed against them in which a government-contractor defense is properly presented. Amici therefore file this brief in support of neither party but rather to inform the Court regarding certain applications of the federal officer removal statute that might not be fully aired in the parties' briefs, and to urge the Court not to disturb the consensus of the lower courts that a colorable government-contractor defense will support removal based on 28 U.S.C. § 1442(a)(1).

SUMMARY OF ARGUMENT

As the lower courts uniformly have concluded, removal is proper under 28 U.S.C. § 1442 when a defense contractor advances a colorable defense under *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). Section 1442 permits removal at the behest of a federal officer, or anyone "acting under" such a federal officer. In *Boyle*, this Court recognized that the interests of the federal government require a careful circumscription of defense contractors' liability for state-law claims. Balancing federal against state interests, the Court held that liability cannot be assessed for design defects as long as the contractor delivered equipment that conformed to reasonably precise specifications approved by the federal government.

Although the specific facts of this case do not involve the *Boyle* defense, the Court's disposition of the case could affect how the lower courts address future petitions for removal by defense contractors. This Court's Section 1442 jurisprudence, as well as the statute's text, history, and purpose, strongly suggest that this Court should not disturb the consensus of the lower courts that removal is proper when a colorable *Boyle* defense is raised. To protect legitimate state interests, this Court has allowed removal under Section 1442 only when the defendant can show a causal connection between its actions and official authority. Defense contractors satisfy this requirement—which, in its balance of federal and state interests, maps directly onto the requirements of the *Boyle* defense.

Although defense contractors are not themselves federal officers, they are "acting under" federal officers when they provide equipment conforming to government-approved specifications (as the *Boyle* defense requires). Indeed, early incarnations of the federal officer removal statute enacted during the War of 1812 and during the Civil War explicitly allowed removal by nongovernmental defendants sued for assisting federal officers in advancing war aims. Now, as then, the Armed Forces cannot operate without enlisting considerable assistance from private entities. To vindicate the purpose of Section 1442 in allowing a federal forum for the protection of genuinely federal interests, this Court should not disturb the consensus of the lower courts in permitting removal by defense contractors who advance a colorable *Boyle* defense.

ARGUMENT

I. THIS CASE MAY IMPLICATE THE AVAILABILITY OF REMOVAL UNDER SECTION 1442 FOR DEFENSE CONTRACTORS WHO POSSESS A COLORABLE DEFENSE UNDER *BOYLE* V. *UNITED TECHNOLOGIES CORPORATION*

A. Section 1442 Has Been Used By Defense Contractors To Remove Cases To Federal Court Where A Colorable Government-Contractor Defense Is Presented

Although respondent sought to remove this case under 28 U.S.C. § 1442(a)(1) based on its contention that its conduct was carried out in compliance with federal regulatory requirements, that is far from the only situation in which private parties have invoked removal under Section 1442(a)(1).[2] Many of those cases involve a distinct fact pat-

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[2] Section 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the

tern: defense contractors who present a colorable government-contractor defense under *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). Although the lower courts have framed the relevant test in a variety of ways, they have uniformly concluded that Section 1442(a)(1) permits removal by such defense contractors. *See infra* Part I.C.

This Court has never squarely addressed the requirements for a private party to remove a case under Section 1442(a)(1).[3] Amici therefore submit this brief to explain why the lower courts are correct in allowing defense contractors to remove under Section 1442(a)(1) and to urge this Court to dispose of this case in a way that preserves the ability of such contractors to remove their cases to federal court.

B. As This Court Recognized In *Boyle*, Federal Law Precludes Defense Contractors From Being Held Liable Under State Law For Defects In Military Equipment Manufactured Pursuant To The Government's Specifications

Defense contractors are indispensable to national security. The military cannot itself produce most of the items that it needs, and so it must rely on contractors to supply its requirements. Inevitably, however, accidents and other unfortunate incidents occur, and because of the difficulty of suing the sovereign, it is not uncommon for parties to sue private contractors, contending that they were injured by defects in the design of items that were supplied to the military.

United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

[3] In *Maryland* v. *Soper*, 270 U.S. 9 (1926), the Court stated that a removal petition brought by a private chauffeur who had entered into a contract with a federal officer would be considered on the same terms as the removal petition brought by his co-defendant federal officers. *Id.* at 27, 30.

As this Court recognized in *Boyle*, such lawsuits against defense contractors—and any assessment of liability against contractors—could affect the operations of the federal government in a direct and adverse way. If a contractor were to be held liable for the manufacture of equipment that it supplied to the military pursuant to government specifications, then "either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way the interests of the United States will be directly affected." 487 U.S. at 507.

Accordingly, the Court in *Boyle* concluded that the interests of the federal government require a careful circumscription of defense contractors' liability. The Court recognized that the procurement of military equipment by the United States, and the potential liability of the private contractors who provide such equipment, are areas of "uniquely federal interest." 487 U.S. at 504-505, 507 & n.1. Therefore, the Court articulated what has become known as a government-contractor defense for situations where there is a "significant conflict with federal policy or interests." *Id.* at 509 (internal quotation marks omitted). Specifically, the Court held that liability for defects cannot be imposed pursuant to state law where three requirements are met (*id.* at 512):

- "the United States approved reasonably precise specifications";
- "the equipment conformed to those specifications"; and
- "the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[4]

[4] The Court added this third requirement "because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability." *Id.*

In framing the government-contractor defense, the Court looked to the discretionary-function exception of the Federal Tort Claims Act (FTCA), which bars any tort suit against the United States that is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). As the Court noted, designing military equipment is "assuredly a discretionary function," one that "often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." *Boyle*, 487 U.S. at 511. The Court determined that if such suits were barred against the government, they should be barred against contractors as well: "It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Id.* at 512.

The *Boyle* test has proven an effective means of balancing the interests of private plaintiffs with the interest of the national government in ensuring the vitality of the nation's Armed Forces. In addition to ensuring a uniform rule regarding financial liability for harm caused by defectively designed military equipment, the test has helped guard against inappropriate inquiry into military decisionmaking and judicial second-guessing of military decisions that would exceed the competence of the judicial branch.[5]

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[5] The government-contractor defense continues to play a vital role in a new era of national security concerns. In the wake of the terrorist attacks of September 11, 2001, Congress established a rebuttable presumption that the government-contractor defense applies in all cases relating to qualified anti-terrorism technologies that have been reviewed and approved by the Secretary of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 863(d), 116 Stat. 2135, 2240, *codified at* 6 U.S.C. § 442(d). Because anti-terrorism technologies are often utilized

C. The Lower Courts Have Routinely Granted Removal Under Section 1442 To Defense Contractors Who Advance A Colorable *Boyle* Defense

The lower courts are uniform in holding that defense contractors can avail themselves of Section 1442.[6] For example, in *Winters* v. *Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), the Fifth Circuit granted removal to

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by private entities at risk of terrorist attack, the presumption extends to sales to such private entities. *See id.* The presumption may be overcome only by evidence that the contractor acted fraudulently or with willful misconduct in submitting information to the Secretary during his review. *See id.*

[6] *See, e.g., Miller* v. *Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001); *Winters* v. *Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998); *Lane* v. *Halliburton*, No. Civ. A. H-06-1971, 2006 WL 2583438, at *2-4 (S.D. Tex. Sep 07, 2006); *McAboy* v. *IMO Indus.*, No. C05-1241L, 2005 WL 2898047, at *3-5 (W.D. Wash. Oct. 27, 2005); *In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 446-451 (E.D.N.Y. 2004); *Crackau* v. *Lucent Techs.*, No. Civ. 03-1376 (DRD) 2003 WL 21665135, at *2-5 (D.N.J. Jun 25, 2003); *Carter ex rel. Estate of Carter* v. *Acands, Inc.*, No. 3:02-CV-00009, 2002 WL 31682352, at *3-5 (E.D. Tex. June 27, 2002); *Good* v. *Armstrong World Indus., Inc.*, 914 F. Supp. 1125, 1127-1131 (E.D. Pa. 1996); *Anderson* v. *Avondale Indus., Inc.*, No. Civ. A. 94-3021, 1994 WL 679827, at *2 (E.D. La. Dec. 5, 1994); *Guillory* v. *Ree's Contract Servs. Inc.*, 872 F. Supp. 344, 346 (S.D. Miss. 1994); *Crocker* v. *Borden, Inc.*, 852 F. Supp. 1322, 1327 (E.D. La. 1994); *Akin* v. *Big Three Indus., Inc.*, 851 F. Supp. 819, 823 (E.D. Tex. 1994); *Pack* v. *AC & S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993); *Fung* v. *Abex Corp.*, 816 F. Supp. 569, 573 (N.D. Cal. 1992); *Bahrs* v. *Hughes Aircraft Co.*, 795 F. Supp. 965 (D. Ariz. 1992); *Gulati* v. *Zuckerman*, 723 F. Supp. 353 (E.D. Pa. 1989). *But cf. Freiberg* v. *Swinerton & Walberg Property Serv., Inc.*, 245 F. Supp. 2d 1144, 1151 n.5 (D. Colo. 2002) (questioning in dicta whether the government-contractor defense fulfills Section 1442's federal-defense requirement); *Ryan* v. *Dow Chem. Co.*, 781 F. Supp. 934, 944-945 (E.D.N.Y. 1992) (same). Judge Weinstein, the author of *Ryan*, has since held that the government-contractor defense does indeed fulfill the requirements of Section 1442. *See In re "Agent Orange"*, 304 F. Supp. 2d at 445.

In some of the above cases, courts did not in fact grant removal, on the grounds that the defendant failed to make the requisite factual showing as to one or more prongs of the Section 1442 test for removal. *See Good*, 914 F. Supp. at 1127-1131; *Anderson*, 1994 WL 679827, at *3-5; *Bahrs*, 795 F. Supp. at 970.

manufacturers of Agent Orange. Citing detailed specifications from the government regarding the design, development, and delivery of Agent Orange, the court found that "a direct causal nexus exists between the defendants' actions taken under color of federal office and [plaintiff's] claims." *Id.* at 400. The court further concluded that such evidence of the government's involvement sufficed to present a colorable *Boyle* defense. *Id.*

Although no other court of appeals has addressed the intersection of Section 1442 with the government-contractor defense, the district courts are uniform in holding that a defense contractor may obtain such removal. *See supra* p. 7 n.6. For example, in *Fung* v. *Abex Corp.*, 816 F. Supp. 569, 573 (N.D. Cal. 1992), the district court granted removal to submarine builders sued by plaintiffs allegedly exposed to asbestos on Navy submarines. The court reasoned that the defendants established that they were subject to "direct and detailed control" by federal officials, who required defendants to construct and repair submarines pursuant to contractual specifications. *Id.* at 573. The court noted that "[t]he government also performed extensive dock and sea trials on the submarines prior to commission, to ensure complete conformity with design specifications." *Id.* at 572-573. The court further concluded that the above facts sufficed to make out a colorable federal defense under *Boyle*. The court dismissed plaintiff's argument that the asbestos itself was not contractually mandated, concluding that *Boyle* broadly addresses "liability for design defects in military equipment." *Id.* at 573.

II. THE INTERESTS THAT UNDERLIE BOTH THE GOVERNMENT-CONTRACTOR DEFENSE AND THE FEDERAL OFFICER REMOVAL STATUTE MILITATE IN FAVOR OF CONSTRUING THE LATTER TO ALLOW REMOVAL BY CONTRACTORS WHO HAVE A COLORABLE DEFENSE BASED ON *BOYLE*

A. The Earliest Federal Officer Removal Statutes Aimed To Ensure That The Operations Of The Federal Government Would Proceed Unhindered Despite Regional Objections To Military Policies

As this Court has recognized, the first federal officer removal statute "was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular." *Willingham* v. *Morgan*, 395 U.S. 402, 405 (1969). Congress tried through various means to restrict trade with Britain during the war, in order to deny the enemy needed supplies and provisions. *See* Donald R. Hickey, *American Trade Restrictions During the War of 1812*, 68 J. Am. Hist. 517 (1981). With the defeat of Napoleon in 1814, British veterans began arriving *en masse* in Canada, leading to a surge in illicit cross-border trade. *See id.* at 534. Customs officials possessed only limited authority to seize goods and were subject to state-court damages actions even where merchandise they seized was condemned and forfeited. *See id.* at 534-535.

To ensure more effective prosecution of the war against Britain, Congress passed legislation designed to expand federal customs officials' power to seize goods that appeared to be on their way to the enemy and to authorize federal customs officers to enlist private assistance in enforcing those duties. *See* Act of Feb. 4, 1815, 3 Stat. 195. To protect both public and private officials from retaliation for their actions in support of the war effort, Congress allowed removal by "any [customs] collector, naval officer, surveyor, inspector, or any other officer, civil or military, *or any other person aiding or assisting*, . . . for any thing done, or omitted to be done, as an officer of the customs, or for any thing done by virtue of this act or under colour thereof." *Id.* § 8, 3 Stat. 198 (emphasis added).

Likewise, midway through the Civil War, Congress enacted another federal officer removal statute expressly designed to prevent interference with the war effort, which had been beset by numerous instances of state courts allowing lawsuits to proceed against federal officers for the performance of their duties in prosecuting what was often an unpopular war. *See* James G. Randall, *The Immunity Act of 1863: A Study in the Wartime Immunity of Government Officers*, 20 Mich. L. Rev. 589 (1922). In the very same statute in which Congress ratified President Lincoln's suspension of the writ of habeas corpus, Congress provided that (1) in any civil or criminal action, the defendant could interpose a defense that his actions were performed either pursuant to a presidential order issued during the rebellion or under color of federal law, and (2) a state-court lawsuit filed against "any officer, civil or military, or against *any other person*" for any wartime acts under color of presidential or congressional authority could be removed to federal court. *See* Act of Mar. 3, 1863, §§ 4-5, 12 Stat. 755, 756 (emphasis added). In so doing, Congress effectively created a defense from liability for those who aided the war effort and allowed both federal employees and private citizens to remove cases to federal court to avail themselves of that defense.

The current federal officer removal statute is the descendant—though much expanded—of those specialized wartime statutes. In 1948, Congress dramatically expanded the removal statute to its current breadth, allowing removal by *all* federal officers and those who act under them. *See Willingham*, 395 U.S. at 405-406 (summarizing history of the federal officer removal statute).

B. The *Boyle* Test Is Fundamentally The Same As The Test This Court Has Applied For Removal Under Section 1442

The purpose of the federal officer removal statute is to protect the exercise of legitimate federal authority against witting or unwitting interference by individual states through their courts. *See, e.g., Arizona* v. *Manypenny*, 451 U.S. 232, 241-242 (1981); *Colorado* v. *Symes*, 286 U.S. 510,

517 (1932). At the same time, the statute does not wholly displace state authority whenever a federal officer, or person acting under that officer, is haled into court. *See, e.g.*, *Mesa* v. *California*, 489 U.S. 121, 125-139 (1989); *Symes*, 286 U.S. at 518. Recognizing that Congress did not intend to override state interests whenever a case involves a federal officer or one acting under such an officer, the Court has emphasized that Section 1442(a)(1) by its terms allows removal only for an act "under color of such [federal] office." The Court has interpreted the requirement of an act "under color of" federal office to mean that the removing defendant must demonstrate not only (1) a "causal connection between the charged conduct and asserted official authority," *Willingham*, 395 U.S. at 409, but also (2) a colorable federal defense, *see Mesa*, 489 U.S. at 125-139. A mere federal connection is not enough for removal: the Postal Service employee who commits a traffic violation while delivering the mail cannot remove to federal court absent any colorable showing that the alleged infraction was justified by federal law. *See id.* at 125-139.

The Court's construction of "under color of [federal] office" in Section 1442(a)(1) maps directly onto the contours of the *Boyle* defense. The Court addressed the same federalism concerns implicated in its Section 1442 jurisprudence—and essentially struck the same balance—when it articulated the elements of the government-contractor defense in *Boyle*. The *Boyle* Court essentially mandated just such a "causal connection" by rejecting a broad rule that would have displaced state law whenever a defense contractor is sued for harm arising out of a purchase pursuant to a government contract:

> [I]t would be unreasonable to say that there is always a "significant conflict" between the state law and a federal policy or interest. If, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a

> significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered.

487 U.S. at 509. This is akin to saying that there is no tie to any "asserted official authority" where the "charged conduct"—the defective product design—caused injury by its inclusion in standard equipment that the government did not design or specify but merely ordered from a catalogue. By contrast, when the contractor works intensively with the government to design and manufacture a precision-crafted item to suit the military's specific needs, any resultant injury *is* causally connected to the exercise of official authority in designing the features of that product. Accordingly, the *Boyle* defense is limited to contexts where the federal government approves "reasonably precise specifications" and the defense contractor delivers equipment that conforms to those specifications.

Therefore, the articulation of a *Boyle* defense meets the first of the Court's requirements for removal under Section 1442 as set forth in *Willingham* and *Mesa*: the causal connection to official authority. And, by definition, it also meets the second requirement: a colorable federal defense.

C. A Contractor Who Presents A Colorable *Boyle* Defense Is "Acting Under" A Federal Officer

Of course, defense contractors who seek removal under Section 1442(a)(1) are not federal officers themselves, and so they must avail themselves of the "acting under" clause of that subsection. Petitioners have argued in their petition for certiorari that the court of appeals misinterpreted that phrase in holding that respondent "acted under" a federal officer by complying with certain Federal Trade Commission regulations. *See* Pet. 18-25. Amici express no view on that aspect of petitioners' argument. Amici do urge the Court, however, not to disturb the consensus of the lower courts that a defense contractor who delivers a product that con-

forms to reasonably precise specifications approved by the government is indeed "acting under" a federal officer.

As a threshold matter, the "acting under" language should be read to encompass private parties—and it appears that neither party, nor the Solicitor General, disputes that point. Indeed, this Court has stated that a petition for removal by a private chauffeur contracted by a federal officer would be considered on the same terms as a petition brought by the officer himself. *Maryland* v. *Soper*, 270 U.S. 9, 27, 30 (1926); *see also Davis* v. *South Carolina*, 107 U.S. (17 Otto) 597, 600 (1883) ("[T]he protection which the law thus furnishes to the marshal and his deputy, also shields all who lawfully assist him in the performance of his official duty."); *cf. City of Greenwood* v. *Peacock*, 384 U.S. 808, 814-824 (1966) (referring to the history of the federal officer removal statute in concluding that a subsection of the civil rights removal statute, 28 U.S.C. § 1443(2), applies to private persons only insofar as they act in association with federal officers).[7]

In addition, the "acting under" clause is not limited to situations where the private party takes part in the *enforcement* of federal law, such as the enforcement of criminal or customs laws. Although the earliest federal officer removal statutes were indeed limited to assistance in enforcing wartime prohibitions and the collection of revenue, the dramatic expansion of the statute in the Judicial Code of 1948, as part of a sweeping revision and recodification of Title 28, enlarged the class of persons who may claim "acting under" status. *See* Pub. L. No. 80-773, 62 Stat. 869, 938 (1948). Immediately prior to the 1948 revision, Section 1442(a) was lim-

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[7] In addition, the statute should be construed to apply to corporations as well as natural persons. *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . .") The context provides no contrary indication: a corporation may take instructions from, and act on the behalf of, a federal officer just as readily as an individual.

ited to revenue officers and persons acting under them. The House Committee on Revision of the Laws, which drafted the revision to Section 1442(a), concluded that "[n]o basis is apparent for including some [federal officers] and excluding others." Committee on Revision of the Laws, House of Representatives, *Revision of Federal Judicial Code: Preliminary Draft* (1945), at 277. Accordingly, Congress expanded the statute to include all federal officers. As the Solicitor General noted in his brief respecting the petition for certiorari, "[b]ecause the 'acting under' clause in Section 1442(a) is directly linked to the set of federal officers who may remove, the 1948 expansion of the class of covered officers necessarily effected a corresponding expansion of the class of private parties who may remove." U.S. Cert. Br. 17-18. Because Section 1442(a) now covers all federal officers, it now applies to all persons "acting under" them, regardless whether they are engaged in classic enforcement activity.

This case does not present an occasion for an attempt at a comprehensive definition of "acting under" in Section 1442(a)(1), but whatever else it may mean to act under a federal officer, the proper construction of the phrase should include defense contractors who produce equipment to the government's specifications. The process by which the Armed Forces acquire equipment from their contractors is intricate and often involves close interaction between the government and the contractors, with the military retaining and using its ultimate authority at every step. Under Department of Defense Instruction 5000.2, Operation of the Defense Acquisition System ("DoD Instruction 5000.2"),[8] the defense acquisition process is divided into three phases: Technology Development, System Development and Demonstration, and Production and Deployment, each of which is highly collaborative in nature.[9] Each phase involves one or

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[8] *Available at* http://www.dtic.mil/whs/directives/corres/pdf/i50002_051203/i50002p.pdf.

[9] *See, e.g.*, DoD Instruction 5000.2, at 3.6.1 ("Technology Development is a continuous technology discovery and development process re-

more "decision points," at which point the government decides whether to continue, advance, or terminate a project or program work effort or phase.[10] According to the government's Defense Acquisition Guidebook,[11] "[t]he review associated with each decision point typically addresses program progress and risk, affordability, program trade-offs, acquisition strategy updates, and the development of exit criteria for the next phase or effort." Defense Acquisition Guidebook 10.1. These reviews are supervised by the Under Secretary of Defense for Acquisition, Technology, and Logistics, *id.* at 10.2, and often result in significant revisions to the project.

What is crucial about this interactive process is that the government is using contractors to *obtain* something that the government needs and is monitoring the process to ensure that the equipment delivered by the contractor does indeed meet the government's requirements. When the government contracts with a private entity to provide it with military equipment, it is essentially using private resources to assist in the execution of a discretionary function of the government—as this Court recognized in *Boyle*.

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flecting close collaboration between the S[cience] & T[echnology] community, the user, and the system developer. It is an iterative process designed to assess the viability of technologies while simultaneously refining user requirements.").

[10] *See, e.g., id.* at 3.7.4 ("The Design Readiness Review during [System Development and Demonstration] provides an opportunity for mid-phase assessment of design maturity as evidenced by measures such as the number of subsystem and system design reviews successfully completed; the percentage of drawings completed; planned corrective actions to hardware/software deficiencies; adequate development testing; an assessment of environment, safety and occupational health risks; a complete failure modes and effects analysis; the identification of key system characteristics and critical manufacturing processes; an estimate of system reliability based on demonstrated reliability rates; etc. Successful completion of the Design Readiness Review ends System Integration and continues the [System Development and Demonstration] phase into the System Demonstration effort.").

[11] *Available at* http://akss.dau.mil/dag/welcome.asp.

Where the government enrolls a private contractor to produce equipment that the government would otherwise produce itself, and the contractor delivers equipment that conforms to the government's reasonably precise specifications, it is fair to conclude that the contractor has "acted under" a federal officer.

D. Policy Considerations Weigh In Favor Of Allowing Defense Contractors To Remove

Several policy considerations support a construction of Section 1442(a)(1) that would allow contractors asserting a colorable *Boyle* defense to remove cases to federal court. All of these considerations stem from the fact that the Constitution entrusts the national defense to the federal government rather than the several States. *See, e.g.*, *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1871) (federal control over Armed Forces is "plenary and exclusive" and "without question from any State authority"). The federal interest is therefore at its strongest, and federalism concerns at their weakest, where military operations, including procurement, are involved.

First, the essential truth underlying *Boyle*—that liability imposed upon defense contractors who manufacture products to government specifications is essentially liability imposed upon the government—militates in favor of allowing removal. A state court's failure to recognize a valid government-contractor defense could harm the federal government. As this Court recognized in *Boyle*, assessment of liability on defense contractors would cause contractors to either decline to enter into future contracts or increase the charge to the government for the contracts they accept. 487 U.S. at 507. Either outcome could make it more difficult for the military to obtain the equipment that it needs.

Second, the government's involvement in approving the design of military products means that the assessment of costs on contractors through civil liability would inevitably involve second-guessing, by various juries across the country, of the discretionary decisions that went into the design process. The second-guessing of such discretionary deci-

sions is precisely what Congress sought to avoid in creating the discretionary-function exemption to the FTCA. *See Boyle*, 487 U.S. at 511 ("the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function."); *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (discretionary-function exemption in FTCA was designed "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."). As this Court has stated, such analysis "would seriously handicap efficient government operations." *United States* v. *Muniz*, 374 U.S. 150, 163 (1963).

Third, even if the defense contractor eventually prevailed, either at trial or upon appeal, a state court's failure to recognize and give effect to a government-contractor defense before trial could hamper military effectiveness. Indeed, this Court has held that certain types of claims fall outside of the FTCA because they "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *United States* v. *Shearer*, 473 U.S. 52, 57-59 (1985). Even though a suit against a defense contractor seeking redress for alleged defective design or failure to warn may appear to be a garden-variety tort suit, litigation of the case may involve a detailed inquiry into the reasons why the military decided to order or use a particular design or type of equipment. These issues implicate "subtle[] and professional decisions as to the composition, training, equipping, and control of a military force [which] are essentially professional military judgments, subject always to civilian control." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

Fourth, there is a uniquely important interest in ensuring that the Armed Forces are subject to a uniform national body of law. Such uniformity could be undermined if the courts of the fifty States were all responsible for determining whether a defendant has established the elements of the government-contractor defense. Such a patchwork quilt could hamstring the military in its dealings with contractors

and, ultimately, undermine the national defense. *Cf.* The Federalist No. 29 (Hamilton) (praising "uniformity in the organization and discipline of the militia" and noting that "[t]his desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority").

Fifth, as has been true since the War of 1812, not every military decision enjoys widespread national support, and the degree of support often varies across regions. Channeling lawsuits involving the military into the federal system, which is better equipped to withstand sectional hostility, conforms to the purposes of the federal officer removal statute. Indeed, as this Court has noted, the predecessors of that statute "were enacted to maintain the supremacy of the laws of the United States by safeguarding officers and others acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power." *Symes*, 286 U.S. at 517.

CONCLUSION

For the reasons stated above, amici submit that the Court, however it disposes of this case, should preserve the availability of removal under Section 1442 for defense contractors who present a colorable defense under *Boyle*.

Respectfully submitted,

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FEBRUARY 2007

APPENDIX

APPENDIX

Amici consist of the following corporations and associations:

1. *Electronic Industries Alliance* comprises nearly 1,300 member companies whose products and services range from the smallest electronic components to the most complex systems used by defense, space and industry, including the full range of consumer electronic products. The Alliance is composed of four sector organizations: the Electronic Components, Assemblies and Materials Association; the Government Electronics and Information Technology Association; the JEDEC Solid State Technology Association; and the Telecommunications Industry Association.

2. *General Dynamics Corporation* employs approximately 81,000 people worldwide and had 2006 revenues of $24.1 billion. The company provides mission-critical information systems and technologies; land and expeditionary combat systems, armaments and munitions; shipbuilding and marine systems; and business aviation. Approximately 68 percent of the company's revenue is derived from contracts with the U.S. government, 10 percent is derived from work with non-U.S. governments, and the balance from commercial customers around the world.

3. *General Electric Company* has long supported the U.S. government across a wide range of products and services, including jet engines, power generation and nuclear power technologies, energy-related services, water treatment technologies, lighting, non-destructive test equipment and technologies relating to Homeland Security, healthcare and biosciences. As of 2005, GE was the 17th largest U.S. government contractor with over $3.5 billion in sales under U.S. government prime contracts and subcontracts.

4. *Hercules Incorporated* previously supplied materials to the United States Armed Forces.

5. *Lockheed Martin Corporation* is principally engaged in the research, design, development, manufacture, integration and sustainment of advanced technology systems, products and services. The corporation reported 2006 sales of $39.6 billion of which approximately 84 percent were made to the United States Government.

6. *Monsanto Company*, a corporation headquartered in Missouri, has asserted the government-contractor defense to several state-law tort actions and has removed those actions to federal court on that basis.

7. *National Defense Industrial Association* is a non-partisan, non-profit organization with a membership that includes almost 1,400 companies and over 43,000 individuals. NDIA has a specific interest in government policies and practices concerning the government's acquisition of goods and services, including research and development, procurement, and logistics support. Its members, who provide a wide variety of goods and services to the government, include some of the nation's largest defense contractors.

8. *Northrop Grumman Corporation* is a $30 billion global defense and technology company whose 120,000 employees provide innovative systems, products, and solutions in information and services, electronics, aerospace and shipbuilding to government and commercial customers worldwide.

9. *Oshkosh Truck Corporation* engages in the design, manufacture and marketing of various commercial, fire and emergency, and military trucks; vehicle bodies; access equipment; portable and stationary concrete batch plants; and mobile medical trailers. Its Defense segment manufactures heavy- and medium-payload tactical trucks.

10. *Raytheon Company* is an industry leader in defense and government electronics, space, information technology, technical services, and business aviation and special mission

aircraft. Raytheon employs 80,000 people worldwide and reported revenues of $20.3 billion in 2006.

11. *Teledyne Technologies Incorporated* is a provider of electronic components, instruments and communications products, including defense electronics, monitoring and control instrumentation for marine, environmental and industrial applications, data acquisition and communications equipment for aircraft and components, and subsystems for wireless and satellite communications. Teledyne also provides systems engineering solutions and information technology services for defense, space and environmental applications, and manufactures general aviation and missile engines and components.

12. *United Technologies Corporation* is one of the ten largest U.S. defense contractors in annual sales to the Department of Defense. UTC subsidiaries Sikorsky Aircraft Corporation and Hamilton Sundstrand Corporation provide helicopters and a variety of aerospace systems, respectively; UTC's Pratt & Whitney division supplies engines for a variety of combat and transport aircraft.

App 336a

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IN THE

Supreme Court of the United States

LISA WATSON, *ET AL.*,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF FORMER COMMISSIONERS AND SENIOR STAFF OF THE FEDERAL TRADE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are former Chairmen, Commissioners and senior staff of the Federal Trade Commission (the "FTC" or the "Commission") who collectively reflect several decades of FTC leadership: James C. Miller III (Chairman, 1981-85), Daniel Oliver (Chairman, 1986-89), George Douglas (Commissioner, 1982-86), Thomas Leary (Commissioner, 1999-2005), Carol Crawford (Director, Bureau of Consumer Protection, 1983-85), John Peterman (Director, Bureau of Economics, 1988-93, and various other senior positions beginning in 1976), and Robert Tollison (Director, Bureau of Economics, 1981-83).[1]

Amici respectfully submit this brief to assist the Court in understanding the full context and nature of the FTC's comprehensive regulatory control over the conduct at issue in this case. *Amici*'s experiences at the FTC give them a unique perspective on the Commission's regulatory approach generally and on the specific role that the FTC has played and continues to play in the regulation of cigarette advertising. In particular, *amici* are intimately familiar with the FTC's decades-long efforts to ensure that consumers receive useful and accurate information about the tar and nicotine content of competing brands of cigarettes. These efforts include employing a variety of formal and informal regulatory tools to foster a uniform standard for measuring

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part. R.J. Reynolds Tobacco Company has made a monetary contribution to this brief's preparation and submission. Messrs. Miller, Oliver, and Peterman have in the past been retained as consultants or expert witnesses for Respondents, but neither they nor any other amici joining this brief are being compensated for their role as *amici* in this case.

tar and nicotine yields, to compel disclosures of those measurements in cigarette advertising, and to define and authorize the use of various descriptors, such as "low-tar" and "light," as shorthand, consumer-friendly references to those measurements.

SUMMARY OF ARGUMENT

This case involves the standard for determining whether a private party is a "person acting under" a federal officer for purposes of the federal officer removal statute, 28 U.S.C. §1442(a)(1). The Eighth Circuit held below that whether a defendant was "acting under" the direction of a federal officer turns on the detail and specificity of the federal government's direction of the challenged activities and whether the government compelled the defendant's compliance with the federal directives. Pet. App. 6a. Applying this test to Respondents' testing, marketing and selling of light cigarettes,[2] which Petitioners contend was deceptive, the Eighth Circuit found the test satisfied because the FTC engages in "comprehensive, detailed regulation and . . . ongoing monitoring" of that activity, and "compel[s] the tobacco companies to adhere to a testing and advertising standard that was prompted by the FTC." Pet. App. 8a, 10a.

Amici take no position on whether the Eighth Circuit articulated the correct legal standard for private-party removal under section 1442(a)(1). *Amici* submit, however, that if the Court were to adopt the Eighth Circuit's interpretation of the statute and allow removal predicated on acts performed pursuant to comprehensive and detailed federal regulations, then Respondents would plainly qualify

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[2] The term "light cigarettes" refers to cigarettes advertised and sold using descriptors such as "low tar" and "lights." As explained below, the FTC has authorized the use of these descriptors as shorthand references to specifically defined ranges of tar yield as measured by FTC-mandated testing.

for removal. As Judge Gruender observed below, the level of the FTC's direction and control of the conduct at issue here—*i.e.*, the testing and marketing of light cigarettes—is "extraordinary." Pet. App. 18a.

The FTC has, for decades, exercised comprehensive and detailed oversight over cigarette companies' claims about the tar and nicotine yields of their products. It has done so using the wide array of formal and informal regulatory tools at its disposal, including rulemaking, policy statements, case-by-case adjudication and consent decrees, advisory opinions, and nominally "voluntary" agreements among the major cigarette manufacturers. Through these measures, the FTC has compelled the cigarette companies to comply with the agency's policy choices concerning the most effective and efficient way to ensure that consumers receive reliable information about the tar and nicotine levels in various cigarettes. Among other things, the FTC:

- developed and mandated the use of a uniform method for determining tar and nicotine yields (referred to as the modified Cambridge Filter Method or the FTC Method), with full awareness of the limitations of the method;
- took the unique step of conducting the tests itself in its own testing laboratory for over twenty years, before eventually delegating testing responsibility to the tobacco industry under FTC specifications and supervision, and publishing those results;
- required cigarette companies to disclose tar and nicotine yields, based on the FTC Method, in all non-permanent cigarette advertising; and
- defined and authorized the use of the descriptors challenged by Petitioners in this case under conditions in which the Commission determined they function as shorthand, consumer-friendly references to FTC Method results.

The FTC took these actions for two very specific reasons: so that consumers would be able to consider tar and nicotine yields in making their brand choices, and so that cigarette manufacturers would be encouraged to compete on the basis of tar and nicotine yields.

The contention, by Petitioners and their *amici*, that these regulations are not compulsory because they resulted from agency action short of rulemaking ignores the realities of the Commission's regulatory strategies. Although the disclosure of tar and nicotine yields results from an agreement among industry participants, that agreement is "voluntary" in name only. The FTC chose to compel such disclosure, but decided—based on past experiences and with the support of members of Congress—that securing an agreement with the major cigarette manufacturers would be more efficient and effective than promulgating a formal rule. The Commission therefore coerced industry participants to enter into an agreement in lieu of rulemaking, demanded that the agreement comply with the agency's exact requirements, and made clear that the FTC would monitor compliance and initiate rulemaking if the agreement turned out to be ineffective. The FTC has similarly demanded, without the need for a formal rule, that cigarette companies strictly limit their use of descriptors such as "light" and "low tar" to cigarettes falling within certain tar ranges as measured by the FTC Method.

In sum, Respondents undertook the conduct challenged in this lawsuit—*i.e.*, testing the tar and nicotine yields of their light cigarettes and making representations about those yields—pursuant to detailed and specific requirements imposed on them by the FTC. For this reason, under the Eighth Circuit's interpretation of section 1442(a)(1), Respondents were entitled to remove this action to federal court.

ARGUMENT

The Eighth Circuit held that a private party is "acting under" a federal officer for purposes of the federal officer removal statute, 28 U.S.C. § 1442(a)(1), where that party is compelled by a federal agency to comply with detailed and specific requirements under a comprehensive federal regulatory scheme. This standard is readily satisfied in a case, like this one, challenging the testing, marketing and sale of light cigarettes. The FTC has, over the course of several decades, established detailed and specific regulations governing the measurement of tar and nicotine yields, as well as advertising claims about the tar and nicotine content of cigarettes. In doing so, the FTC made the deliberate choice to forego the promulgation of formal rules in favor of more flexible regulatory alternatives. That the Commission chose this strategy does not make acquiescence with its regulatory directives optional. To the contrary, the FTC expects cigarette companies to market their products in full compliance with the Commission's regulatory directives, and subjects companies that fail to do so to adverse legal action.

I. THE TESTING, MARKETING AND SALE OF LIGHT CIGARETTES IS SUBJECT TO COMPREHENSIVE FEDERAL CONTROL AND REGULATION

Over the course of several decades, the FTC has used a broad array of regulatory tools to impose detailed and specific requirements relating to the testing of, and advertising claims about, tar and nicotine yields in cigarettes.

A. The FTC Employs a Broad Range of Regulatory Tools To Compel Compliance With Its Consumer-Protection Policies

As an independent agency with far-reaching regulatory powers, the FTC employs a variety of tools in carrying out

its broad mandate to protect consumers from "unfair or deceptive acts or practices." Federal Trade Commission Act ("FTC Act") § 5(a)(1), 15 U.S.C. § 45(a)(1).[3] The FTC Act authorizes the Commission to promulgate rules, known as Trade Regulation Rules, through notice-and-comment rulemaking. *See* FTC Act §§ 6(g), 18, 15 U.S.C. §§ 46(g), 57a. The Act also empowers the Commission to initiate administrative adjudication and to seek injunctive and monetary relief in federal court. *See* FTC Act §§ 5(m), 13, 19, 15 U.S.C. §§ 45(m), 53, 57b.

The FTC also employs several less formal mechanisms to achieve regulatory compliance. For example, it frequently issues Industry Guides that serve as "administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements." 16 C.F.R. § 1.5 (2007). These Guides "provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry," *id.*, and are especially useful in getting firms to abandon practices simultaneously where each firm may be reluctant to lose a competitive advantage by doing so unilaterally. *See FTC Operating Manual* ch. 8 § 3.3, *available at* http://www.ftc.gov/foia/adminstaff-manuals.htm (visited March 28, 2007). The FTC similarly issues Advisory Opinions in response to requests by private parties. *See* 16 C.F.R. § 1.1 (2007). These Opinions are "binding upon the Commission with respect to the person or group to whom such opinion is issued with regard to the acts, practices, or conduct described in the request." *FTC Operating Manual* ch. 8 § 4.3.

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[3] Indeed, the FTC's independence extends, under some circumstances, to its litigation authority in this Court. *See* FTC Act § 16, 15 U.S.C. § 56(a)(3)(A). There is no evidence that the brief of the Solicitor General in this case reflects the views of the FTC.

Finally, the FTC uses the threat of formal agency action, such as rulemaking or litigation, to encourage industry participants to agree voluntarily to prevent unfair or deceptive practices. The FTC thus frequently enters into consent decrees to end or forestall litigation. *Id.* ch. 6 § 3. The FTC similarly encourages industry participants to adopt "voluntary" agreements as a substitute for trade regulation rules. Between 1919 and the 1960s, for instance, the FTC regularly held trade practice conferences to encourage industries to write their own rules, subject to final approval by the Commission. *See Federal Trade Commission 90th Anniversary Symposium—Program Brochure* 6-7 (Sept. 22-23, 2004), *available at* http://www.ftc.gov/ftc/history/90thAnniv_Program.pdf (visited March 28, 2007). Because formal agency action typically entails the expenditure of significant resources by both the FTC and the industry, the solicitation of such "voluntary" agreements is often the most efficient way for the FTC to achieve its regulatory objectives.

As explained below, during the FTC's long history of regulating cigarette advertising, it has successfully employed all of these regulatory tools. It litigated against tobacco companies for making misleading tar and nicotine claims; it provided Industry Guides for cigarette advertising; it issued Advisory Opinions on tar and nicotine claims; it used the threat of rulemaking to orchestrate a "voluntary" agreement among the major cigarette companies to provide tar and nicotine data in their print advertising; and it published policy statements concerning tar and nicotine advertising in the *Federal Register* and in its FTC News Releases.

B. The FTC Has a Long History of Regulating Claims About Tar and Nicotine Content

The FTC's long history of regulating claims about the tar and nicotine yields of cigarettes dates back decades. *See, e.g., In re Benson & Hedges*, 33 F.T.C. 1659, 1659-60 (1941) (FTC enforcement action).

By the 1950s, the cigarette industry had responded to the growing awareness of the health risks of cigarettes by creating and marketing filtered cigarettes as lower in tar and nicotine. Given uncertainties at the time about the health effects of tar and nicotine, the FTC initially sought to enjoin questionable advertising claims about filters and tar and nicotine yields. *See False and Misleading Advertising (Filter-Tip Cigarettes): Hearings Before a Subcomm. of the Comm. on Gov't Operations H.R.*, 85th Cong. 274-75 (1957) (statement of FTC Acting Chairman Robert T. Secrest) [hereinafter Secrest Statement]. But because the FTC was not equipped to test cigarettes and there was no standardized test, it was difficult to prove that any particular claims were deceptive or unfair. *Id.* at 275-76.

As an alternative to litigation, therefore, the FTC decided to work with the industry to establish guidelines for cigarette advertising. In September 1955, following consultation with cigarette manufacturers, the agency formally adopted the Cigarette Advertising Guides for the use of its staff in evaluating cigarette advertisements. *Id.* at 276. Among other things, the Cigarette Advertising Guides permitted claims about tar, nicotine, and other ingredients of cigarette smoke so long as such claims had been "established by competent scientific proof." Cigarette Advertising Guides, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (Sept. 22, 1955). By 1957, working under the Guides, the FTC had obtained voluntary discontinuance of seventy-five advertising claims it found objectionable, without having to institute any formal proceedings; many other objectionable advertisements were abandoned before they ever reached the public. Secrest Statement, *supra*, at 278-79. During his congressional testimony in 1957, FTC Chairman Secrest expressed satisfaction with the FTC's regulatory achievements:

> [The] adoption and administration of the guides did more to prevent deceptive advertising of cigarettes and to fulfill the Commission's responsibility to the public

> than it could possibly have accomplished by any other means.

Id. at 279-80.

Notwithstanding these efforts, during the second half of the decade, cigarette companies continued competing to produce and advertise cigarettes with lower tar and nicotine yields. During this "tar derby," as the period of competition became known, cigarette companies employed different tar and nicotine testing methods to substantiate their claims about the lower yields of certain brands. Concerned that the lack of a uniform testing method was confusing to consumers, the FTC in December 1959 ended the "tar derby" by demanding that cigarette companies eliminate all references to low or reduced tar or nicotine in their advertisements. *See* Correspondence from William H. Brain, FTC Bureau of Consultation Attorney, to John Vance Hewitt (Dec. 17, 1959) (J.A. 12). The FTC backed up this demand with a threat to refer non-complying advertisements to the agency's enforcement bureaus. *Id.* The FTC subsequently sought and obtained signed undertakings from the seven major cigarette manufacturers to eliminate all references to tar and nicotine claims from cigarette advertising. *See* 1960 FTC Ann. Rep. 82.

FTC Chairman Paul Rand Dixon described these measures as notice to the industry that the FTC would deem "any reference to tar or nicotine content" sufficient to "support a complaint" for false and misleading advertising. *See* Correspondence from Paul Rand Dixon, FTC Chairman, to Warren G. Magnuson, Chairman of U.S. Senate Committee on Commerce 3 (Apr. 11, 1966) [hereinafter *Dixon-Magnuson Correspondence*]. Although the measures stopped short of formal regulatory action, C. Lee Peeler, then Deputy Director of the FTC's Bureau of Consumer Protection, described them as a "ban" on tar and nicotine advertising. C. Lee Peeler, *Cigarette Testing and the Federal Trade Commission: A Historical Overview, in*

National Cancer Institute, *Smoking and Tobacco Control Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes* 1, 2 (1996), *available at* http://cancercontrol.cancer.gov/tcrb/monographs/7/index.html (visited March 28, 2007).

C. The FTC Requires Uniform Testing of Tar and Nicotine Yields

During the 1960s, the FTC's total ban on tar and nicotine advertising was called into question as mounting scientific evidence indicated that the health risks of smoking could be lowered through reductions in tar and nicotine yields. The American Cancer Society, for example, expressed its "conviction . . . that the Federal Trade Commission can render a major service to the health of the public by rescinding its restriction relative to the mention of the tar and nicotine content of cigarette smoke in cigarette advertising and on the packages of the various brands of cigarettes." *Dixon-Magnuson Correspondence*, *supra*, at 8-9 (internal quotation marks omitted).

In response to such demands, the FTC notified the nation's cigarette manufacturers of its determination that factual statements about tar and nicotine yields would no longer be deemed to violate the FTC Act or the 1955 Cigarette Advertising Guides provided that no collateral health claims were made, and that claims about tar and nicotine content were supported by testing conducted in accordance with a uniform testing protocol approved by the FTC. *See* FTC News Release (Mar. 25, 1966) (J.A. 20-21). The FTC subsequently solicited comments and held public hearings on the proper testing protocol, *see Cigarette and Related Matters: Methods To Be Employed in Determining Tar and Nicotine Content; Notice of Public Hearing*, 31 Fed. Reg. 14,278 (Nov. 4, 1966) (J.A. 27-29), and, in reliance on comments and testimony, ultimately adopted as its testing protocol a modified version of the Cambridge Filter Method

that became known as the "FTC Method." *See Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11178 (Aug. 1, 1967) (J.A. 46-47); FTC News Release, *FTC to Begin Cigarette Testing* (Aug. 1, 1967) [hereinafter *Testing Release*] (J.A. 52-56).[4]

In response to calls by members of Congress for the FTC to itself conduct cigarette testing, *see, e.g.*, *Strengthening the Cigarette Labeling Act*, 112 Cong. Rec. 17270, 17274-75 (July 27, 1966) (Sens. Magnuson and Kennedy), the FTC took the "very unusual" step of opening its own testing laboratory in May 1967, J.A. 290, and began testing cigarettes under the FTC Method on August 1, 1967. *See* Statement of Federal Trade Commission Chairman Paul Rand Dixon on Activation of Cigarette Testing Laboratory (May 15, 1967); *Testing Release*, *supra*. The FTC published the results of its testing approximately every year in the *Federal Register* and in its annual reports to Congress. *See, e.g.*, *Cigarette Testing Results, Tar and Nicotine Content*, 36 Fed. Reg. 15074 (Aug. 12, 1971).

In 1987, the FTC delegated testing responsibility to the private Tobacco Industry Testing Lab (the "TITL"). *See* Correspondence from John P. Rupp, Attorney for cigarette manufacturers, to Judith P. Wilkenfeld, Program Director of Cigarette Advertising and Testing at FTC (June 30, 1987).

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[4] The FTC Method uses a machine to measure the tar and nicotine yielded when a cigarette is smoked according to specific parameters:

> The FTC regulations involve the use of a cigarette smoking machine. The machine is set to specific parameters governing the depth to which the cigarette is inserted, the volume of air drawn through the burning cigarette with each "puff," the number of puffs drawn per minute and the amount of the cigarette consumed. The tar and nicotine captured by a filter in the machine are then measured.

Pearson v. Philip Morris, Inc., No. 0211-11819, 2006 WL 663004, at *1 (Or. Cir. Ct. Feb. 23, 2006).

Testing at the TITL is conducted under FTC monitoring and supervision, including periodic unannounced inspections, and the FTC uses compulsory process to require the tobacco companies to submit the TITL's measurements to the FTC in sworn statements under penalty of perjury. *See, e.g., Report on the Tar, Nicotine, and Carbon Monoxide of the Smoke of 1249 Varieties of Domestic Cigarettes For the Year 1995*, 63 Fed. Reg. 3576 (Jan. 23, 1998).

The FTC does not permit deviation from the FTC Method. To the contrary, the Commission adopted an official method precisely because it believed the test provided a "reasonable standardized method" that was "capable of being presented to the public in a manner that is readily understandable." *Testing Release*, *supra*, at 1 (J.A. 53). The FTC therefore made clear from the start that it would deem deceptive the use of measurements derived from any method other than the FTC Method, because "[u]se of more than one testing method would . . . only serve to confuse or mislead the public." *Id.* at 1-2 (J.A. 53). Indeed, in 1978, the FTC issued an Advisory Opinion rejecting a request to use a measurement method other than the FTC Method, even if the method would produce *higher* tar and nicotine yields, because of the potential for consumer confusion. *See Proposed advertising plan to disseminate cigarette advertisements headlining, without qualification, tar values higher than latest published FTC number disapproved*, 92 F.T.C. 1035, 1035 (1978) (J.A. 201-02).

In its 1968 Report to Congress, the FTC made clear its motivation for replacing its earlier ban on tar and nicotine advertising with its new testing regime:

> Based upon the proposition that lower yield cigarettes present a lessened hazard to the American public, the Commission has acted within the past year to (1) augment information available to the public on the tar and nicotine content of cigarettes and (2) prompt

> cigarette manufacturers to develop less hazardous cigarettes.

Federal Trade Commission, *Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act* 17 (June 30, 1968) [hereinafter *1968 Report to Congress*] (J.A. 15).

D. The FTC Requires Disclosure of Tar and Nicotine Yields

The FTC's 1966 policy reversal was only the first step taken by the FTC to help inform consumers about machine-measured tar and nicotine yields of cigarettes. Soon after, the FTC took steps to require manufacturers to include tar and nicotine yield disclosures in all cigarette advertising. Furthermore, the FTC determined that it would authorize and permit other representations of tar and nicotine—including the very sort of product descriptors challenged by Petitioners in this action (for example, "low tar" and "light")—so long as such representations and advertising claims were substantiated by FTC Method test results.

On August 8, 1970, the FTC formally proposed a Trade Regulation Rule requiring cigarette manufacturers to "disclose, clearly and prominently, in all advertising the tar and nicotine content of the advertised variety or varieties [of cigarettes] . . . based on the most recently published Federal Trade Commission test results." *Advertising of Cigarettes: Notice of Public Hearing and Opportunity To Submit Data, Views, or Arguments Regarding Proposed Trade Regulation Rule*, 35 Fed. Reg. 12671, 12671 (Aug. 8, 1970) (J.A. 135). The FTC explained that such disclosures were necessary to encourage "greater interest in obtaining a low tar and nicotine cigarette" and to facilitate "competition among the cigarette companies to meet that interest." Federal Trade Commission, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act* 15 (Dec. 31, 1970) [hereinafter *1970 Report to Congress*].

Congress and the FTC recognized, however, that it would be preferable to avoid the attendant costs and delays of

notice-and-comment rulemaking. During his confirmation hearings, FTC Chairman-designate Kirkpatrick was asked about the possibility of pursuing an industry-wide agreement as an alternative:

> Senator Magnuson: I wanted to ask you if [the proposed Trade Regulation Rule on tar and nicotine listing in advertising] can be done by voluntary agreement, without the need of long, drawn out litigation or further legislation, would that be better than the rule?
>
> Kirkpatrick: In my judgment; yes, sir.
>
> . . . .
>
> Senator Magnuson: [I]t seems to me if there could be achieved a voluntary agreement on this tar and nicotine, which this committee has long pursued, or at least we have been talking about it, that that might be the better arrangement.
>
> Kirkpatrick: It would be a highly desirable arrangement, sir; indeed, yes.

Nomination—1970: Hearing Before the S. Comm. on Commerce on Nomination of Miles W. Kirkpatrick, To Be Chairman of the Federal Trade Commission, 91st Cong. 172 (1970) (J.A. 140-41).

Accordingly—as it did a decade earlier in successfully ending the tar derby—the FTC took steps to prompt cigarette manufacturers to comply "voluntarily" with the FTC's desired requirements. With the proposed trade regulation rule looming, the Commission directed participants in the tobacco industry to submit a plan describing how they would agree to disclose tar and nicotine yields in cigarette advertising. *See FTC Directs Tobacco Industry to Submit Specifics on Disclosing Tar and Nicotine Content*, Federal Trade Commission News (Oct. 1, 1970) (J.A. 145). The Commission subjected the initial industry proposal to a period of public comment, and Commission staff ultimately

recommended rejecting the proposal and threatened to continue the rulemaking process unless a number of changes were made. *See* Correspondence from Allen F. Brauninger, Attorney in FTC Bureau of Consumer Protection, to Commission (Nov. 9, 1970) (J.A. 148-58); Correspondence from FTC Chairman Miles W. Kirkpatrick to Commission (Nov. 24, 1970) (J.A. 159). The cigarette companies made concessions, and, on December 22, 1970, after the agreement had been revised to the FTC's exact requirements, the FTC voted to accept the agreement (the "1970 Agreement"), suspend the rulemaking proceeding indefinitely, and thereby "afford the tobacco industry an opportunity to implement the letter and the spirit of the amended plan." Correspondence from Allen F. Brauninger, Attorney in FTC Bureau of Consumer Protection, to Commission (Dec. 21, 1970) [hereinafter Brauninger Dec. 21, 1970 Correspondence] (J.A. 160-93); Correspondence from Joseph W. Shea, Secretary, to General Counsel, Director of Bureau of Consumer Protection, Director of Public Information, and Legal and Public Records (Dec. 22, 1970).

The 1970 Agreement requires that tar and nicotine yield measurements be disclosed in non-permanent cigarette advertising with the legend "av. per cigarette by FTC method." Brauninger Dec. 21, 1970 Correspondence (J.A. 168). The FTC characterized its exaction of the agreement as "Regulatory Activity" in its 1970 report to Congress, *see 1970 Report to Congress*, *supra*, at 17-20, and warned the cigarette industry that it would reinitiate rulemaking if the agreement was not effective in compelling tar and nicotine yield disclosures. *See* Brauninger Dec. 21, 1970 Correspondence (J.A. 160-63); *FTC Suspends Proceeding to Require Disclosure of Tar and Nicotine Content in Cigarette*

Advertising After Industry Amends Voluntary Plan, Federal Trade Commission News (Dec. 23, 1970).[5]

E. The FTC Authorizes and Defines Descriptors Such As "Low Tar" and "Light" for Use As Shorthand References to Tar and Nicotine Yields

As the final prong of its regulatory program, the FTC approved the use of descriptors, such as "low tar" and "light," to refer to specified yields of tar. The Commission recognized that, to the extent the descriptors functioned merely as shorthand, consumer-friendly references to FTC Method results, their use supported the FTC's dual goals of providing consumers with information about tar and nicotine yields and encouraging the manufacture of lower-yield cigarettes.

When the FTC reversed its policy in March 1966 and allowed the advertising of tar and nicotine yields, it was not immediately clear to what extent the Commission would permit representations beyond the numerical test results, especially given the FTC's statement that no "collateral" representations would be permitted. *See supra* p. 10. Ultimately, the FTC adopted and publicized an "enforcement policy" providing that "representations relating to[] tar and nicotine content of cigarettes" are permissible "where they are shown to be accurate and fully substantiated by" FTC Method results. FTC News-Release (Oct. 26, 1967). The FTC repeated its position on this issue in its 1968 Report to Congress. *See 1968 Report to Congress*, *supra*, at 18 (J.A. 15-16).

Consistent with this policy, and as a signal to the entire industry, the FTC in 1969 launched a proceeding against a

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[5] As detailed below, *see infra* pp. 25-26, the FTC has successfully taken enforcement action against cigarette companies that tried to deviate from the disclosures required by the 1970 Agreement.

cigarette manufacturer for stating that certain brands were "lower" in tar in the absence of substantiation by the FTC Method. *See In re Am. Brands, Inc.*, 79 F.T.C. 255 (1971) (J.A. 203-08). In a 1971 decree resolving the case, the FTC reaffirmed that it would permit the use of descriptive terms such as "low," "lower," "reduced," and "like qualifying terms" only if their use was substantiated by the FTC Method and was accompanied in advertising by a disclosure of the underlying tar and nicotine numbers under the FTC Method (as is required for all cigarette advertising by the 1970 agreement discussed above). *Id.* at 258-59 (J.A. 207-08).[6] Years later, in another consent decree, the FTC again reaffirmed that "express or implied representation[s] . . . that [a] brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine" are not misleading or deceptive only if those representations are substantiated by FTC Method results. *In re Am. Tobacco Co.*, 119 F.T.C. 3, 11 (1995). Before entry of this order, the FTC described this statement as providing "a limited 'safe harbor' for advertising that complies with certain specific requirements in its use of official tar and nicotine ratings." *The American Tobacco Company; Proposed Consent Agreement With Analysis To Aid Public Comment*, 59 Fed. Reg. 51980, 51982 (Oct. 13, 1994) (J.A. 222).[7]

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[6] The FTC lacked the power to impose a corresponding disclosure requirement with respect to descriptors on cigarette packages. *See* Federal Cigarette Labeling and Advertising Act § 5(a), 15 U.S.C. §-1334(a) ("No statement relating to smoking and health, other than the statement required by [this Act], shall be required on any cigarette package.").

[7] Consistent with the FTC's policy for all consent decrees, 16 C.F.R. § 2.34, the *American Brands* and *American Tobacco* consent decrees were published for notice and comment. *See* 59 Fed. Reg. 51980; *FTC Consent Order Forbids Unlimited 'Low Tar' Claims by Cigarette Maker*, FTC News (July 13, 1971). The FTC engages in notice and comment for consent decrees because of its recognition that consent decrees provide

In its 1968 Report to Congress, the FTC also adopted the convention, since then continuously followed both inside and outside the industry, of using the descriptor "low tar" to refer to 15 milligrams or less of tar yield, measured by the FTC Method. *See 1968 Report to Congress, supra*, at 18 (J.A. 15). The FTC has reiterated over the years that it "formally defines a low 'tar' cigarette as one that has 15.0 or less milligrams of 'tar.'" Matthew L. Myers *et al.*, *Staff Report on the Cigarette Advertising Investigation* 1–50 n.175 (1981); *see also* Correspondence from FTC Chairman Janet D. Steiger to Samuel Broder, Director of National Cancer Institute 3 (July 20, 1994) (using the term "low-tar" to refer to cigarettes with less than 15 milligrams of tar).[8] Other government agencies have recognized these definitions. *See, e.g.*, *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. 44396, 44952 (Aug. 28, 1996) (noting that "[a]pproximately 80% of the cigarettes on the market today are either low-tar (6 to 15 mg tar) or ultra-low-tar (less than 6 mg tar)"). Additionally, the FTC treats the descriptor "light" as synonymous with "low tar." *See, e.g.*, *Cigarette Testing Request for Public Comment*, 62 Fed. Reg. 48158, 48163 (Sept. 12, 1997).

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industry-wide guidance as to the FTC's regulatory policies. *See FTC Operating Manual* ch. 6, §§ 11-.15.

[8] *See also* Federal Trade Commission, *Report to Congress Pursuant to the Cigarette Labeling and Advertising Act—For the Year 1979*, at 11 n.8 ("'low tar' [is] define[d by the Commission] as 15.0 mg. or less tar") (J.A. 210); Federal Trade Commission, *Report to Congress Pursuant to the Cigarette Labeling and Advertising Act—For the Year 1980*, at 18 n.11 (same) (J.A. 213); Ira Taylor Whitten, *Brand Performance in the Cigarette Industry and the Advantage to Early Entry, 1913-74, Staff Report to the Federal Trade Commission* 35 (June 1979) (referring to the FTC's "official definition of low-tar cigarettes (15 or less milligrams of tar)").

The FTC's definitions of these descriptors are well-understood in the public-health community. The 1981 Surgeon General Report, for example, stated that "[l]ower 'tar' cigarettes conventionally have been defined as yielding 15 mg of 'tar' or less per cigarette." U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette, A Report of the Surgeon General* 23 (1981). Similarly, the National Cancer Institute has explained:

> In the United States, cigarette brands yielding approximately 1-5 or 6 mg tar by [the FTC] method are generally called 'Ultra-Light'; brands yielding between approximately 6 or 7-15 mg tar are called 'Light'; and brands yielding more than 15 mg tar are called 'Regular' or 'Full Flavor.' By convention, cigarettes yielding 15 mg tar by the FTC method are called 'low tar.'

Lynn T. Kozlowski *et al.*, *Cigarette Design*, *in* National Cancer Institute, *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* 13 (2001), available at http://cancercontrol.cancer.gov/tcrb/monographs/13/ (visited March 28, 2007).

F. The FTC Maintains Its Policies Despite Awareness of Their Limitations

From the beginning of its testing program, the FTC was aware that while the FTC Method accurately measured the comparative tar and nicotine yields among different brands of cigarettes when smoked under the identical circumstances simulated by the machines, it was of limited use in measuring or predicting actual tar and nicotine intake by individual smokers. The Commission explained to the public at the time it began testing that:

> [t]he [FTC] Method does not and cannot measure the[] many variations in human smoking habits. It does not measure tar or nicotine in the smoke generated while

> the cigarette is not being puffed. It does not measure all of the tar and nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method. Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by [a] machine in accordance with the prescribed method.

Testing Release, *supra*, at 2.

Nor did the adoption of the FTC Method end the Commission's investigation of its method's limitations. Since it began testing in 1967, the FTC has repeatedly considered whether it should abandon or modify its regulatory program in response to the very theories and allegations asserted by Petitioners in this case. On each occasion, the FTC has declined to change its program, and use of the FTC Method is still required today. *See, e.g.*, *Cigarette Testing, Tar and Nicotine Content Results*, 42 Fed. Reg. 21155, 21155 (Apr. 25, 1977) (noting questions about method but declining to take further action) (J.A. 127-28); *Commission Determination re Barclay Cigarettes; Amendment of Report of "Tar," Nicotine, and Carbon Monoxide Content of 208 Varieties of Cigarettes; Request for Comment on Possible Testing Modifications*, 48 Fed. Reg. 15953, 15954-55 (Apr. 13, 1983) (seeking public comment on implications for testing of "compensatory smoking behavior") (J.A. 129-34); *Cigarette Advertising and Other Promotional Practices, Announcement of Decision*, 43 Fed. Reg. 11856, 11856-57 (Mar. 22, 1978) (recognizing that smokers may "compensate" for low-tar cigarettes by covering ventilation holes and thereby increasing the amount of tar inhaled, but nonetheless deciding to retain FTC Method testing).

In declining to change its regulatory program notwithstanding evidence of smoker compensation, the FTC

relied on epidemiological studies showing that persons who smoked cigarettes that measured lower in tar under the FTC Method were less likely to get smoking-related diseases than were persons who smoked cigarettes that measured higher in tar under the FTC Method. *See* Peeler, *supra*, at 7. As the FTC's Bureau of Consumer Protection subsequently explained:

> [A]bandoning the testing system without instituting another method of tar testing would have been premature because then-current epidemiological evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that had occurred since the 1950's.

Id. In fact, at the time, FTC staff specifically opposed abandoning the FTC's program because of fears that without the program, "cigarettes will gradually become higher in tar and nicotine," which "[e]vidence clearly indicates . . . would be harmful." Undated Memorandum from Judith P. Wilkenfeld & Susan Cohn to Commission re "Modification of FTC Cigarette Testing Methodology," at 42 n.41.

The FTC also specifically investigated the use of descriptors in view of allegations similar to those made by Petitioners here. For example, in 1992, at the behest of a consumer group, the FTC launched an investigation focused specifically on whether the terms "light" and "low tar" should be prohibited as deceptive. *See* Coalition on Smoking OR Health, Petition Before the Federal Trade Commission (1992). The FTC decided to continue to permit the use of these descriptors, as substantiated by FTC Method results. *See* Correspondence from John D. Graubert, FTC's Deputy General Counsel, to Lucia M. Valente, Counsel to New York Attorney General (Sept. 10, 1998). Similarly, in 1998, Senator Lautenberg requested that the FTC "begin a proceeding to suspend the right of tobacco companies to market any cigarettes as 'Light' or 'Ultra Light' or list

supposed nicotine and 'tar' ratings on their products and advertisements until and unless an accurate system of measuring the health implications of cigarettes is established." Correspondence from Senator Frank R. Lautenberg to FTC Chairman Robert Pitofsky (Nov. 24, 1998). The FTC again declined the request, explaining that the request "raised issues currently under review at the Commission." Federal Trade Commission, *FTC Statement in Response to Senator Frank Lautenberg's Letter*, FTC News (Nov. 24, 1998).

II. CIGARETTE COMPANIES ARE REQUIRED TO COMPLY WITH THE FTC'S REGULATORY DIRECTIVES

As detailed above, in advertising and marketing light cigarettes, companies are subject to specific and detailed federal regulation imposed by the FTC to further the agency's considered regulatory policies. Specifically, the FTC requires cigarette companies (i) to subject all brands to testing for tar and nicotine yields pursuant to the FTC Method, (ii) to disclose on all cigarette advertising the tar and nicotine yields as measured by the FTC Method, and (iii) to use non-numeric descriptors such as "low-tar" and "light" only as shorthand, consumer-friendly references to specifically defined ranges of tar yield under the FTC Method.

Petitioners and their *amici* contend, however, that these regulatory directives are not compulsory because they are embodied in informal agency statements, nominally "voluntary" agreements among the major cigarette manufacturers, and consent orders with individual companies, rather than in a formal trade regulation rule. *See* Pet. Br. at 39-48; Amicus Br. of Campaign for Tobacco-Free Kids *et al.* at 5-24. In taking the steps described above, however, the FTC appropriately selected among the broad array of regulatory tools in its arsenal to craft an effective

and efficient regulatory scheme that is no less compulsory than more formal agency action.

1. The FTC's decision to forego rulemaking in light of its inefficiencies, *see supra* pp. 13-15, is a perfectly appropriate means of pursuing the Commission's regulatory policies. Courts and commentators have long recognized that federal agencies develop and communicate their policies and directives by choosing among "the great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it." *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).[9]

The FTC is the classic example of an agency that has "a broad range of flexible enforcement powers available for use, as deemed necessary in [its] sound discretion and expert judgment." *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 997 (D.C. Cir. 1973); *see also Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) ("Congress has authorized the FTC to exercise its supervisory powers under the [FTC] Act in a variety of ways."). As detailed above, the FTC has a long history of expertise in using informal means—including advisory opinions, industry guides, agreements among major industry participants, and exemplary enforcement actions—to secure adherence to FTC policies. *See supra* pp. 6-7. These informal tools, no less than notice-and-comment

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[9] *See also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein" (internal quotation marks omitted, ellipsis in original)); *In re Tak Communications, Inc.*, 138 B.R. 568, 578 (W.D. Wis. 1992) (FCC policy communicated through a series of denials of licensing applications), *aff'd*, 985 F.2d 916 (7th Cir. 1993); *Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 10 (Cal. 2004) (FDA policy established through informal letter); Kenneth C. Davis, *Administrative Law & Government* 283 (2d ed. 1975); Charles H. Koch, Jr., *Administrative Law & Practice* § 5.43 (1997).

rulemaking, constitute enforcement of federal law by the Commission. Indeed, this Court has held that the FTC's consistent administrative "construction [of a statute that it administers] is entitled to great weight even though it was applied in cases settled by consent rather than in litigation." *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 391 (1959) (internal citations omitted).[10]

2. The FTC used just such a combination of formal and informal tools in directing cigarette companies to test and disclose tar and nicotine yields pursuant to the FTC Method. Petitioners' characterization of the testing and disclosure as mere voluntarily adherence to an agreement to which the FTC is not a party ignores the context and effect of the 1970 Agreement and the steps that FTC has taken to ensure compliance with the agreement.

The 1970 Agreement arose against the backdrop of a proposed FTC trade regulation rule that would have required cigarette companies to disclosure tar and nicotine yields measured pursuant to the FTC Method. *See supra* p. 13. With the support of members of Congress, however, the FTC hoped to avoid "long, drawn out litigation" by pursuing the "highly desirable arrangement" of an agreement among the major industry participants. *See supra* p. 14. The FTC had recent experience with such an agreement, having successfully used the device to end the "tar derby" a decade earlier. *See supra* pp. 9-10. The FTC thus used the threat of rulemaking and enforcement action to effectively coerce the cigarette companies to enter into the 1970 Agreement on the FTC's own terms. *See supra* pp. 14-16. That is why the

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[10] *See also Alaska v. O'Neill Investigations, Inc.*, 609 P.2d 520, 529 (Alaska 1980) (FTC consent decrees constitute "administrative interpretation[s]" with "precedential value"); *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140, 141 (Mass. 1978) (FTC's policy inferred from complaints and cease and desist orders).

FTC characterized its acceptance of the agreement as "Regulatory Activity." *1970 Report to Congress*, *supra*, at 17-20.

In addition to using the 1970 Agreement to mandate testing and disclosure pursuant to the FTC Method, the Commission put the cigarette industry on notice that it intends to bring an enforcement action, for unfair and deceptive practices, against any cigarette company that uses a measurement method other than the FTC method, even if that method yields *higher* tar and nicotine yields. *See supra* pp. 11-12 (describing FTC's 1967 News Release and its 1978 Advisory Opinion). Indeed, that the testing-and-disclosure regime established by the 1970 Agreement effectively binds the industry is exemplified by the FTC's 1983 enforcement action against Brown & Williamson.

In that case, the FTC determined that a new Brown & Williamson cigarette was designed in an unusual way to register inaccurately low tar and nicotine yields during FTC Method testing. *See FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd in part and rev'd in part*, 778 F.2d 35 (D.C. Cir. 1985). Brown & Williamson rejected the FTC's demand that it alter its advertisements to state a higher estimated yield, instead maintaining the lower figure and referencing its own independent testing, rather than the FTC Method. Despite conceding the "literal truth" of the company's advertising claim, 580 F. Supp. at 984, the FTC sought and obtained an injunction barring use of that claim.

The D.C. Circuit upheld the district court's injunction without direct evidence of consumer confusion on the ground that deviation from the FTC Method was "inherently deceptive." 778 F.2d at 41-42. Noting that "tar milligram figures have significance only as comparative values," the court of appeals upheld the FTC's and district court's conclusions that no disclaimer disclosing use of a method other than the FTC Method could possibly eliminate the

deception that would necessarily arise from the use of another testing method. *Id.* at 42-43. The court based this conclusion on the district court's findings that "after 12 years of exposure to FTC ratings, consumers have become 'habituated' to the tar and nicotine 'legends' in cigarette advertisements" and would likely not understand than any disclaimer "signified a departure from the long-utilized FTC Report numerical ratings." *Id.* at 43.

The D.C. Circuit's holding thus endorsed the FTC's view that departure from the system of testing and disclosure established by the 1970 Agreement constitutes a violation of federal law.[11] In light of this ruling and the FTC's clear statement of its enforcement position, it ignores reality to contend that the FTC's testing-and-disclosure regime is anything but compulsory.

3. Petitioners also point to the absence of any applicable Trade Regulation Rule in support of their contention that the FTC does not control the cigarette companies' use of descriptors such as "light" and "low-tar." This argument, too, relies on too narrow a view of the FTC's regulatory strategies. The FTC made a policy determination that it was in the interests of consumers for cigarette

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[11] The D.C. Circuit did narrow the scope of the district court's injunction, which had permanently enjoined any and all such future departures, but only after envisioning a theoretical scenario in which one cigarette company conducted independent testing of all competing brands and prominently displayed the comparative results in its advertisements. 778 F.2d at 45. Because such a hypothetical advertisement might not be inherently deceptive, the D.C. Circuit reasoned, the FTC would, in the absence of a specific Trade Regulation Rule, retain the burden of proving deceptiveness under the FTC Act. *Id.* The court's refusal to enjoin this highly unrealistic theoretical deviation from the FTC's testing-and-disclosure regime was based on First Amendment concerns about an "impermissibly broad prior restraint," *id.* at 43, and is fully consistent with the court's broader endorsement of the FTC's position.

companies to compete on the basis of such descriptors; it prompted their use by announcing to the industry that descriptors were permissible in advertising so long as they were substantiated by FTC Method results; and it repeatedly defined the descriptors so that their usage in the industry—by cigarette companies, public health professionals and government entities alike—became standardized. *See supra* pp. 16-19.

The fact of this FTC policy determination is further confirmed by the action the FTC brought in 1969 against American Brands, Inc. for claiming that certain of its cigarette brands were "lower" in tar when the claim was not substantiated by the FTC Method. *See supra* pp. 16-17. This action put the industry on notice that any use of descriptors unsupported by comparative testing using the FTC Method would be viewed as an unfair and deceptive trade practice.

4. Petitioners contend that the consent orders that resulted from the FTC enforcement actions against Brown & Williamson and American Brands do not constitute regulatory direction because they are not by their terms binding on other industry participants. *See* Pet. Br. at 44-48. While it is technically true that a consent order runs against the defendant only—the FTC could not, for example, seek to hold Respondents in contempt for violating the American Brands consent order—it is also beside the point. The FTC's position that a practice violates the Act "is entitled to great weight even though it was applied in cases settled by consent." *Mandel Bros.*, 359 U.S. at 391. Moreover, the consent orders signal the FTC's enforcement policies to the industry, letting other manufacturers know what practices will result in an enforcement action by the Commission, and providing them with the opportunity to adjust their behavior accordingly.

In 1987, then-chairman of the FTC, Daniel Oliver, testified before Congress that "it is more efficient," and

therefore "serves the consumers' interest better," for the FTC "to bring a single case against the first offender in order to stop the practice" without the need for rulemaking. *FTC Nicotine Program: Hearing Before the Subcomm. on Transp., Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong. 17-18 (May 7, 1987) (testimony of FTC Chairman Daniel Oliver). Chairman Oliver explained that, in the case of the cigarette industry:

> [I]t is entirely reasonable to suppose that one action against one cigarette company would have an effect on all of them, and that you would not have to make a rule. You would do the same thing much faster bringing a single case; that would benefit the consumers. So my job is deploying resources, and I would much prefer to bring a case, which can be done in a tenth of the time that making a rule can be done. I think that's a more effective way to deploy law enforcement resources for the benefit of the consumer.

Id. at 19; *see also, e.g.*, Roscoe B. Starek, III, *Prosecutorial Discretion: A View From The Federal Trade Commission*, Regulation, Fall 1997, at 24, 25-26, *available at* http://www.cato.org/pubs/regulation/reg20n4d.pdf (visited March 28, 2007) (FTC commissioner explaining that the FTC "interprets and implements the FTC Act primarily through the prosecution and adjudication of individual cases").

5. Finally, the degree of the FTC's regulatory control over the marketing of light cigarettes is illustrated by the numerous lower-court decisions recognizing the legal effect of the Commission's acts. Specifically, several courts have concluded that the FTC's actual, detailed oversight in this area precludes efforts to attack the use of descriptors under state law. For example, in *Brown v. Brown & Williamson Tobacco Corp.*, No. 06-30130, 2007 WL 470406 (5th Cir. Feb. 14, 2007), the Fifth Circuit held that "the use of FTC-approved descriptors [such as 'lights' and 'lowered tar and

nicotine'] cannot constitute fraud." *Id.* at *6. The Court explained that "[c]igarettes labeled as 'light' and 'low-tar' do deliver less tar and nicotine as measured by the only government-sanctioned methodology for their measurement. In fact, [cigarette m]anufacturers are essentially forbidden from making any representations as to the tar and nicotine levels in their marketing about tar that are not based on the FTC method." *Id.* The panel thus concluded that "[t]he terms 'light' and 'lowered tar and nicotine' cannot, therefore, be inherently deceptive or untrue." *Id.* Moreover, it concluded, "[t]o hold that the [m]anufacturers' use of the FTC-approved terms relating the FTC-approved measurement system constitutes affirmative misstatement under State law would directly undermine the entire purpose of the standardized federal labeling system and most courts have been reluctant to find liability on this basis." *Id.*

Another court recently observed that "the FTC could, and did, specifically authorize all United States tobacco companies to utilize the words 'low,' 'lower,' 'reduced' or like qualifying terms, such as 'light,' so long as the descriptive terms are accompanied by a clear and conspicuous disclosure of the 'tar' and nicotine content in milligrams of the smoke produced by the advertised cigarette," and held that this precluded the imposition of liability for such conduct under a state consumer protection statute. *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 50 (Ill. 2005), *cert. denied*, 127 S. Ct. 685 (2006). Several other decisions are in accord. *See, e.g., Prado Alvarez v. R.J. Reynolds Tobacco Co.*, 313 F. Supp. 2d 61, 75 (D.P.R. 2004) (holding that challenges to descriptors "conflict with the FTC's regulation of the area"), *aff'd*, 405 F.3d 36 (1st Cir. 2005); *Good v. Altria Group, Inc.*, 436 F. Supp. 2d 132, 138 (D. Me. 2006) (the FTC has determined that "descriptors are not forbidden and are not unfair or deceptive (at least if not unsubstantiated)"); *Pearson v. Philip Morris, Inc.*, No. 02-11 2006 WL 663004, at *1 (Or. Cir. Ct. Feb. 23, 2006) ("The

FTC also specifies the machine-measured yields a cigarette can give and still qualify for a description as 'low tar.'").

CONCLUSION

For the reasons set forth above, in testing, marketing and selling light cigarettes, Respondents are subject to comprehensive and detailed federal regulatory directives. As a result, if the Court concludes that the Eighth Circuit applied the correct legal standard for private-party removal under 28 U.S.C. § 1442(a)(1), it should affirm the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LISA WATSON, ET AL.,-

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PUBLIC CITIZEN, INC., AARP, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, U.S. PIRG, CONSUMER FEDERATION OF CALIFORNIA, CONGRESS OF CALIFORNIA SENIORS, AND PUBLIC HEALTH ADVOCACY INSTITUTE, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a private corporation engaged in marketing cigarettes is a "person acting under [a federal] officer" and is acting "under color of such office" for purposes of 28 U.S.C. § 1442(a)(1), entitling the corporation to remove to federal court a civil action brought in state court under state law, solely because the corporation's actions were influenced by federal regulatory authorities.

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INTEREST OF *AMICI CURIAE*

Public Citizen, Inc., AARP, the National Association of Consumer Advocates, U.S. PIRG, the Consumer Federation of California, the Congress of California Seniors, and the Public Health Advocacy Institute, Inc., submit this brief in support of the petitioners because the decision below directly implicates *amici*'s interests in defending the role of state courts in providing consumer remedies under state law.[1]

Public Citizen, Inc., is a consumer advocacy organization founded in 1971. On behalf of its approximately 100,000 members nationwide, Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues and works toward enactment and effective enforcement of laws protecting consumers, workers, and the general public. Public Citizen is concerned with improving public health laws and regulations and ensuring access to the court system for the redress of injuries caused by unsafe and defective products. Public Citizen thus has an interest in litigation involving tobacco products, which have caused grievous illness and injury to so many people. Public Citizen also seeks to counter the misuse of removal and the defense of preemption, which defendants increasingly invoke to burden plaintiffs and escape liability.

AARP is a non-profit, nonpartisan organization with more than 36 million members. As the largest membership organization representing interests of Americans aged 50 and older, AARP supports laws and public policies designed to protect its members' rights and to preserve availability of legal redress when they are harmed in the marketplace. AARP is concerned that if allowed to stand, the Eighth Circuit's

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[1] Letters of consent to the filing of this brief from all parties are on file with the Clerk. The brief was not authored in whole or part by counsel for a party. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

opinion will encourage other regulated products and entities (e.g., prescription drugs, long term care services, nursing homes, etc.) to claim the same entitlement not to be sued in state court that the court afforded Philip Morris, thereby disrupting the balance of state and federal judicial authority, needlessly impairing plaintiffs' access to state courts to assert state-created causes of action involving a broad array of products and services, and substantially burdening an already overtaxed federal judiciary.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices.

U.S. PIRG, the federation of state PIRGs, is a national non-profit advocacy group. Its mission is to protect consumers, ordinary citizens, and our natural environment. It seeks to uncover threats to public health and well-being and fight to end them, using the tools of investigative research, media exposés, grassroots organizing, advocacy and litigation.

The Consumer Federation of California is non-profit consumer advocacy organization, established in 1960, for the purpose of enacting consumer protection laws and regulations, ensuring their enforcement and conducting education and research on consumer matters. CFC has filed amicus briefs in both state and federal courts in matters, such as this one, that relate to the protection of consumers.

The Congress of California Seniors (CCS) is a membership non-profit organization dedicated to protection of California's senior population through education and advocacy.

The Public Health Advocacy Institute, a 501(c)(3) nonprofit organization founded in 1979 and located at Northeastern University School of Law in Boston, is devoted to supporting and enhancing public health understanding and commitment among law teachers and students, legislators and regulators, the courts, and others who shape public policy through the law. Its primary area of research and scholarship focuses on legal strategies to reduce the adverse public health impact of tobacco industry products.

This case implicates *amici*'s concerns in several ways. The decision below places a roadblock in the way of plaintiffs asserting state-law tort claims in state courts by cloaking cigarette companies in the guise of federal government actors and granting them the removal rights of federal officers sued for actions under color of government office. By treating a company subject to federal *regulation* as if it were a federal officer or agency, the Eighth Circuit's opinion will give rise to many more removal attempts as other companies—many subject to much greater federal regulation than the tobacco industry—seek to take advantage of this broad, judicially created expansion of the federal officer removal statute.

Amici believe a brief reflecting their perspective may assist the Court in reviewing the Eighth Circuit's novel ruling. In particular, it may be useful to the Court to consider arguments, not addressed by the court below, about the statutory requirement that the removing party be a "person" who is being sued for action "under color of [federal] office," and to receive detailed information about how the supposedly "unusual" and "unique" regulation of cigarettes by the Federal Trade Commission compares to the much more extensive regulation of other products and businesses by other federal agencies. Far from justifying a special status for cigarette companies as federal agents, the FTC's actions provide no basis for singling them out for special protections unavailable to other industries that are, in fact, more heavily regulated.

INTRODUCTION AND SUMMARY OF ARGUMENT

In May 1878, federal internal revenue agent James Davis raided a moonshine still in the hills near Tracy City, Tennessee. Before he and his companion could destroy the still, seven armed men attacked them. Returning fire, Davis killed one of his assailants, wounded another, and captured a third, but he was forced to retreat without destroying the still. According to a contemporary newspaper account, the raid caused "intense excitement" in the neighborhood. www.tngenweb.org/monroe/news3.txt.

A local grand jury indicted Davis for murder. With the support of the Attorney General of the United States, Davis invoked the predecessor to 28 U.S.C. § 1442(a)(1) and removed the case to federal court on the ground that he had acted in the discharge of his duties as a federal officer and was immune from state prosecution. In *Tennessee v. Davis*, 100 U.S. 257 (1880), this Court affirmed the removal, holding that because the federal government "can act only through its officers and agents," the ability to remove state court actions brought against federal officers and agents for actions within the scope of their duties was essential to the vindication of federal authority. *Id.* at 263. The Court has repeatedly pointed to *Davis* as exemplifying the core purposes of § 1442(a)(1)'s authorization for removal of cases by federal officers and persons acting under their direction who are sued in state court for the performance of official acts. *See, e.g., Mesa v. California*, 489 U.S. 121, 126-27 (1989); *Arizona v. Manypenny*, 451 U.S. 232, 241 n.16 (1981); *Willingham v. Morgan*, 395 U.S. 402, 406 (1969).

This case is a far cry from *Davis*. Here, the Philip Morris Companies, Inc., a corporation engaged in a purely private enterprise, has been sued for fraudulently misrepresenting the hazardous nature of one of its products—so-called "light" cigarettes. The statute's history provides no support for the notion that it was intended to protect private corporations, as opposed to natural persons acting on behalf of the federal

government (or, under a recent amendment to the statute, federal agencies themselves).

In addition, there is no claim that, in promoting and selling its cigarettes, Philip Morris was exercising any government authority or carrying out any official function of the United States. Rather, the company's claim to removal, which was accepted by the Eighth Circuit, rests solely on the supposed "regulation" of certain aspects of the cigarette industry's activities by the Federal Trade Commission, as a result of which Philip Morris claims to have been "acting under" a federal officer.

Finally, the Eighth Circuit's decision departs from all previous federal appellate case law on federal officer removal by permitting removal based solely on the extent of federal regulation of private business activity that is not in any way performed for the benefit of the federal government. The justification offered by the Eighth Circuit and parroted by Philip Morris—that the FTC's regulation of cigarette companies is so "unusual" or, indeed, "unique" as to justify treating cigarette makers as if they were federal agents—is patently wrong. Many industries are subject to much more detailed and extensive regulation than the cigarette industry. Thus, if the Eighth Circuit's reasoning were extended beyond cigarette companies, its decision could result in a tremendous expansion of federal removal jurisdiction. And any attempt to limit the effect of the ruling to Philip Morris and other cigarette companies (based on the supposed "uniqueness" of federal regulation of the industry) would result in an equally significant distortion of federal law: A special dispensation would be granted to the very industry whose claim to such indulgence is weakest.

ARGUMENT

I. The Corporate Defendants Are Not "Persons" Entitled To Invoke Federal Officer Removal.

The federal officer removal statute, 28 U.S.C. § 1442(a)(1), provides for removal when "any officer (or any person acting under that officer) of the United States or any agency thereof" is sued in a state court "for any act under color of such office." As the *Davis* case illustrates, and as this Court held in *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), the principal purpose of the removal statute was to protect *individual* federal officers, employees, and agents from prosecutions and lawsuits in unsympathetic state courts arising out of performance of their official duties. Philip Morris, as a corporation, falls well outside of the universe of intended beneficiaries of the statute and does not qualify as a "person" who may invoke removal under it. Although the Eighth Circuit followed the majority of courts in assuming that a corporation is a person under the statute, that issue has never been resolved by this Court, and several federal courts have concluded that the statute only applies to natural persons. *See Krangel v. Crown*, 791 F. Supp. 1436, 1442 (S.D. Cal. 1992); *C.H. v. American Red Cross*, 684 F. Supp. 1018, 1023-24 (E.D. Mo. 1987) ("person" in 1442(a)(1) refers to natural person); *Roche v. American Red Cross*, 680 F. Supp. 449, 455 (D. Mass.1988) (same); *Gensplit Fin. Corp. v. Foreign Credit Ins. Ass'n*, 616 F. Supp. 1504, 1508-10 (E.D. Wis. 1985) (same).

We emphasize that the Court need not reach this issue to reverse the Eighth Circuit here, because, as explained below, it is so clear that even if the Philip Morris Company qualifies as a "person," it is not here being sued for actions taken "under" a federal officer and "under color of [federal] office." However, the Court could not *affirm* the exercise of subject matter jurisdiction over this action without addressing this as-

yet unresolved issue and deciding that the Philip Morris Company is a "person" under this statute.

The history of the removal statute, which was canvassed extensively by this Court in *Willingham*, 395 U.S. at 405-06, *Mesa*, 489 U.S. at 125-28, and *Primate Protection*, 500 U.S. at 85-86, shows an overwhelming concern for the protection of vulnerable individual officers and employees of the federal government against arrest or other interference by state authorities in the performance of their duties. *See also Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 941-44 (E.D.N.Y. 1992) (describing history of statute). As this Court put it in *Primate Protection*, addressing the statutory predecessors to § 1442(a)(1), "Congress expressly limited whatever removal power it conferred upon federal defendants to *individual officers*," and the Congress that enacted the current version of the statute in 1948 similarly determined "that *individual officers* ... needed the protection of a federal forum in which to raise their federal defenses." 500 U.S. at 85, 86 (emphasis added). In the words of one federal district court:

> The series of enactments culminating in Section 1442(a) were initially designed to protect Federal revenue officers from prosecution or civil suit in State Court for violation of State law. ... Subsequent amendments have, from time to time, enlarged the class of Federal officers and employees who might claim protection, but these additions left unchanged the basic theory and purpose of this removal privilege: that the officer was entitled to—and the interest of national supremacy required—his protection in actions brought against him which attacked and threatened him with personal liabilities or penalties.

New Jersey v. Moriarity, 268 F. Supp. 546, 555 (D.N.J. 1967) (footnote omitted).

Moreover, when read in context, the statutory language granting removal rights not only to an "officer," but also to a "person acting under his direction" does not reflect an intent

to grant protection to corporations and other artificial entities.[2] Rather, it was apparently intended to protect federal employees and other individual agents who would not otherwise qualify as "officers of the United States," a term of art referring to officers who exercise significant authority. *See Primate Prot.*, 500 U.S. at 81 (noting limited scope of term "officers of the United States");[3] *see also Ryan*, 781 F. Supp. at 941 (noting that the need to protect "[s]ubordinate [customs] inspectors" was among the reasons for enactment of the first federal officer removal statute). Thus, the committee report accompanying the 1948 legislation that created § 1442(a)(1) in its current form explained that "[t]he revised subsection ... is extended to apply to all officers and employees of the United States and any agency thereof." H.R. Rep. No. 80-308, at A134 (1947) (quoted in *Primate Protection*, 500 U.S. at 84). Nothing in the history of the statute as canvassed in the relevant judicial decisions suggests that Congress intended generally to benefit corporations, much less

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[2] The Dictionary Act, codified in its current form at 1 U.S.C. § 1, provides that "unless the context indicates otherwise," the word person includes corporations and other impersonal private entities. Here, as explained below, the context does indicate otherwise. *Cf. Adams v. United States*, 420 F.3d 1049 (9th Cir. 2005) (context of Federal Tort Claims Act indicates that "persons acting on behalf of a federal agency in an official capacity" in 28 U.S.C. § 2671 includes only natural persons). In addition, the use of the term "person" in the federal officer removal statute long predates the first enactment of the Dictionary Act in 1871 and could not possibly have been informed by the Act. *See Lippoldt v. Cole*, 468 F.3d 1204, 1215 (10th Cir. 2006) (holding that Dictionary Act does not assist in determining congressional intent in statutes predating its enactment).

[3] Indeed, *Primate Protection* suggests that the 1948 enacting Congress may have even had a more limited definition of "officer of the United States" in mind, *see* 500 U.S. at 81, because at that time it was not clear that the phrase encompassed officers of certain independent agencies. Thus, it was all the more essential to add the word "person" to ensure coverage of employees and agents of independent agencies.

those whose only qualification for "officer" status is that they are regulated by (or doing business with) the government.

Although this Court has never addressed a case involving the application of the statute to a corporation, in *Primate Protection* the Court demonstrated the limits of the statute in holding that the term "officer ... or person acting under him" did not apply even to federal agencies. 500 U.S. at 82-84. In so holding, the Court emphasized that Congress had limited the statute to "individual federal officers" (as opposed to agencies) because it was individual federal officers and employers who were being prosecuted and sued in state courts, and whom Congress wanted to protect from such actions. *Id.* at 85. The Court further reasoned that "individual federal officers" had a greater need for "the protection of a federal forum in which to raise their federal defenses." *Id.* at 86. The Court's reasoning strongly suggests that corporations, like agencies, fall outside the concerns that led Congress to provide protection for vulnerable individuals against potentially hostile state courts.[4]

Following *Primate Protection*, Congress amended § 1442(a)(1) to permit the United States and federal agencies, in addition to federal officers and persons acting under them, to invoke removal. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850. Although one court has suggested that "Congress's amendment of the statute to emphasize its broad scope supports the conclusion that 'person' encompasses more than mere individuals," *In re "Agent Orange," Product Liability Litigation*, 304 F. Supp. 2d 442, 447 (E.D.N.Y. 2004), the way Congress amended the statute in fact supports exactly the opposite in-

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[4] *Cf. Mignona v. Sair Aviation, Inc.*, 937 F.2d 37, 41 (2d Cir. 1991) (holding, in the aftermath of *Primate Protection*, that a nonappropriated fund instrumentality of the federal government was not entitled to remove cases against it, because, as "an impersonal entity, [it] is not an 'officer' of the United States").

ference. Congress did *not* bring agencies within the ambit of the statute by changing the definition of "person," which the Court in *Primate Protection* had held did not encompass them. Rather, Congress left in place the statutory protection for officers and persons acting under them, and added the United States and federal agencies as a *separate category* of entities that could invoke the statute. Nothing in Congress's changes to the statute reflects a broader intent to alter, let alone expand, the definition of "person" or to benefit non-human entities other than the United States and its agencies.

Thus, if the statute applies to corporations because they are "persons," it must also have done so before 1996, when actual agencies of the United States were held by this Court to be prohibited from invoking the statute—an incongruous result, to say the least. In short, the history of the statute contains no suggestion that Congress intended to grant to corporations and other non-human entities an entitlement that, until 1996, was not even available to the government's own agencies; and the 1996 amendment of the statute in no way indicates that in extending that entitlement to agencies, Congress also gave it to corporations.

II. A Private Business, Even If Subject to Federal Regulation, Does Not Act "Under" a Federal Officer or Perform "Any Act Under Color of Such Office" When It Is Not Enforcing or Executing Federal Law.

On its face, the federal officer removal statute requires not only that the *actor* who is sued be a government officer or person acting directly under an officer, but also that the *action* for which the defendant is sued be an official one—that is, an act "under color of such office." The under-color-of-office requirement is a critical limitation of the statute, integral to its core purpose of providing for removal "broad enough to cover all cases where *federal officers* can raise a colorable defense *arising out of their duty to enforce federal law*." *Willingham*, 395 U.S. at 406-07 (emphasis added); *see*

also Arizona v. Manypenny, 451 U.S. at 241 ("[R]emoval under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a *federal official* is entitled to raise a defense *arising out of his official duties.*") (emphasis added).

The Court emphasized this critical limitation in two of its leading decisions applying the statute, *Maryland v. Soper (No. 1)*, 270 U.S. 9 (1926), and *Maryland v. Soper (No. 2)*, 270 U.S. 36 (1926). The *Soper* cases, like *Davis*, arose from the efforts of federal revenue agents to break up an illegal still, this one near the hamlet of Madonna, Maryland. After a futile pursuit of a group of moonshiners, the agents destroyed the still and, as they left the site, found a mortally wounded man lying beside a path. Although they claimed not to know how the man had been killed, the agents (and their chauffeur) were arrested by the local sheriff and indicted for murder and conspiracy to obstruct justice by falsely denying any knowledge of the circumstances leading to the victim's death. The officers invoked the predecessor to § 1442(a)(1) to remove the prosecutions to the U.S. District Court for the District of Maryland, which denied a motion to remand. This Court reversed as to both the murder and conspiracy prosecutions.

In *Soper (No. 1)*, addressing the murder prosecution, the Court held that the defendants' removal petition was deficient because it failed to explain in any manner how the alleged murder constituted an action "under color of ... office" other than that the death occurred during a time when the agents were engaged in performing their duty of enforcing the prohibition laws. 270 U.S. at 35. The Court emphasized that the statute required more:

> The [action] to be removed under the section must have been instituted "on account of" acts done by the defendant *as a federal officer under color of his office* .... There must be causal connection between *what the officer has done under asserted federal authority* and the state prosecution. It must appear that the prosecution of

> him for whatever offense has arisen out of the acts done by him *under color of federal authority and in enforcement of federal law* ....

Id. at 33 (emphasis added). Because the defendants' petition did not state that "whatever was done by them leading to the prosecution was done under color of their federal official duty," and thus left open the possibility that they were being prosecuted for a murder *not* committed under color of federal authority, *id.* at 35, the Court found that, unless the petition could be amended to rectify this deficiency, the case must be remanded.

Having so held with respect to the murder charges, the Court in *Soper (No. 2)* made even shorter shrift of the claim that the prosecution for conspiracy to obstruct justice was removable. The Court held that the defendants' responses to the criminal investigation by state authorities were not "acts under federal authority" because they were not "closely connected with, and included in, the attempted enforcement of the federal law," nor were the officers acting "in performance of their duty as officers of the United States" when they gave the allegedly false evidence. 270 U.S. at 43. Because the prosecution was not for "acts done by these defendants solely in pursuance of their federal authority," the Court held that a "fair construction" of the statute did not permit removal. *Id.* at 44.[5]

Similarly, in *Gay v. Ruff*, 292 U.S. 25 (1934), the Court enforced the limit placed on removal by the statute's requirement that an action be based on acts "under color of office." *Gay* concerned a 1916 amendment to the statute that provided that any "officer of the courts of the United States" could remove an action brought against him "for or on ac-

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[5] In a third case, *Maryland v. Soper (No. 3)*, 270 U.S. 44 (1926), the Court also applied *Soper (No. 2)* to require remand of a perjury prosecution against one of the defendants.

count of any act done under color of his office or in the performance of his duties as such officer." *Id.* at 27.[6] The removed action was a lawsuit brought against the receiver of a railroad (who had been appointed by and was an officer of a federal court) alleging that the railroad's negligence had resulted in the death of the plaintiff's son. Emphasizing that the statute's purpose was to protect officers engaged in the enforcement of federal law and not to produce a wholesale expansion of federal jurisdiction over otherwise non-federal claims, *see id.* at 31-35, Justice Brandeis' opinion held that the claim must be remanded to state court, and rested its holding squarely on the "under color of office" requirement: "A suit for damages for an injury resulting from negligent operation of a train is not, within the meaning of [the federal officer removal statute], a suit 'for or on account of any act done under color of his (the receiver's) office.'" *Id.* at 39.

For precisely the same reason, a suit predicated on injuries resulting from Philip Morris's design, marketing and sale of so-called "light" cigarettes is not brought "for any act under color of [federal] office" within the meaning of § 1442(a)(1). As Philip Morris itself has successfully argued elsewhere, whatever selling cigarettes may be, it is not an activity performed *under color of federal office*. *See Brown v. Philip Morris Inc.*, 250 F.3d 789, 801 (3d Cir. 2001) (accepting Philip Morris' argument that federal regulation of its marketing practices did not make its actions "under color of federal law" for purposes of a *Bivens* action). And *Soper (No. 2)* leaves no doubt that misleading the public as to the health risks associated with "light" cigarettes falls well outside the furthest possible bounds of action under color of federal office.

Nor can Philip Morris's purely self-interested private conduct be brought within the realm of action "under color of

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[6] The provision is now codified at 28 U.S.C. § 1442(a)(3).

office" by the federal regulation to which it was (supposedly) subject. This Court has made clear that even "extensive" regulation of the activities of a business does not make its actions under color of law; rather, a private person acts under color of law only when its action "may be fairly treated as that of the [government] itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *accord Blum v. Yaretsky*, 457 U.S. 991 (1982); *see also Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743, 748 (9th Cir. 2003) ("That a private entity is regulated by government does not transform that private entity's conduct into state action."); *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 837-39 (9th Cir. 1999) (a private entity does not act "under color of law" merely because it acts under compulsion of government regulation); *Cobb v. Georgia Power Co.*, 757 F.2d 1248 (11th Cir. 1985) (heavy regulation of a private entity does not make its actions "under color of law").[7]

Indeed, this Court's precedents suggest that, if anything, the phrase "under color of such office" in the removal statute is even more limited than the "under color of law," which is used in 42 U.S.C. § 1983 and elsewhere to describe conduct that qualifies as government action for constitutional purposes. Thus, under § 1983, action "under color of law" includes action "under pretense of law," but, as the *Soper* holdings illustrate, the under color of office requirement in the removal statute requires an exercise of authority actually conferred by office. *See Screws v. United States*, 325 U.S. 91, 111-12 (1945) (opinion of Douglas, J.). A fortiori, if regula-

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[7] Similarly, that a business is operating under government contracts whose specifications it must meet does not transform its conduct into government action. As this Court has stated, "many private corporations['] ... business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982).

tory compulsion is not enough to make private action "under color of law," it also cannot bring private conduct within the narrower category of action "under color of [federal] office" within the meaning of 28 U.S.C. § 1442(a)(1). There is all the difference in the world between merely *complying* with federal regulations and stepping into the shoes of a federal regulator acting under color of his office. As one early decision under the removal statute put it:

> The purpose of the statute is to protect the revenue officers of the government in the line of their official duties, and those who are employed to act under them in the performance of such duties; but, further than providing this necessary protection to the administration of its revenues, the federal government has no interest in the business affairs of the people incidentally brought within the range of the tariff system.

Johnson v. Wells Fargo & Co., 98 F. 3, 8 (C.C. Cal. 1899).[8]

Rather, removal of suits based on actions taken by federal officers or their subordinates under color of office must be limited to cases where the removing defendant was "effectively an agent or employee of the government" performing "official functions" on its behalf. *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 846, 845 (N.D. W. Va. 2004); *see also Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (a defendant invoking the removal statute must be so "intimately involved with government functions as to occupy essentially the position of an employee");

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[8] In *Johnson*, the plaintiff sued Wells Fargo, a common carrier, for refusing to deliver a package for which the plaintiff had refused to purchase a one-cent stamp that federal law required Wells Fargo to affix to each item shipped. Wells Fargo removed the case to federal court, arguing that in requiring the purchase of the stamp, it was acting under the direction of a federal revenue officer. The federal court rejected Wells Fargo's argument that its mere compliance with the federal regulatory requirement made its action one under color of federal office.

Brown & Williamson Tobacco Corp. v. Wigand, 913 F. Supp. 530, 533 (W.D. Ky. 1996) (tobacco whistleblower Jeffrey Wigand could not remove an action brought against him for giving grand jury testimony because "he has not been directed to perform official functions as an officer or agent of the government").

The requirement that a removing defendant act under official direction in the performance of an official function thus excludes from the coverage of the statute entities that are merely conducting their own private business under regulatory or other requirements imposed by the federal government. *See Virden*, 304 F. Supp. 2d at 844-45 (citing cases). Philip Morris's conduct in marketing "light" cigarettes was not in any way performed on behalf of the federal government or as an exercise of its authority; hence it was not action "under color of [federal] office."

The intrinsically private nature of Philip Morris's conduct no doubt explains why Philip Morris discovered that it was "acting under" a federal officer so late in the game (particularly in light of the company's assertion that there is a long and unique history of federal regulation of its activities). The first reported decision in a case where a cigarette company claimed federal officer removal did not come until 2002, *see Tremblay v. Philip Morris, Inc.*, 231 F. Supp. 2d 411 (D.N.H. 2002), and even in the Eighth Circuit some of Philip Morris's attempted removals on this ground have recently been held untimely. *Craft v. Philip Morris Companies, Inc.*, 2006 WL 744415 (E.D. Mo. Mar. 17, 2006). And as noted above, when it suited Philip Morris's interests in other litigation, the company steadfastly denied that its actions could be equated to those of a government officer acting under color of law. *See*

Brown v. Philip Morris, 250 F.3d at 801. Philip Morris was right then; it is wrong now.[9]

III. The FTC's "Regulation" of Cigarettes Has Never Been Uniquely or Even Unusually Extensive.

Recognizing that "mere participation in a regulated industry is insufficient" to support removal, Br. in Opp. 14, Philip Morris has attempted to defend the Eighth Circuit's decision on the ground that the regulation to which it was subject was so "unusual" and even "unique" as to differentiate Philip Morris from other regulated businesses and justify a special removal rule for tobacco cases. Br. in Opp. 10. But if regulation is not enough to transform a private enterprise's conduct of its business into action "under color of federal office," it does not matter whether that regulation is more or less extensive. And in any event, the Eighth Circuit's characterization of the regulation of cigarette companies as "unprecedented," on which Philip Morris relies, Br. in Opp. 18, is baseless. Left standing, the decision below will lead either to a potentially vast expansion of federal officer removal, as other more heavily regulated businesses seek the same benefit afforded Philip Morris by the Eighth Circuit, or to an unprincipled special rule benefiting only the tobacco industry.

A. The FTC's Weak "Regulation" of the Cigarette Industry Did Not Compel Philip Morris to Take the Actions for Which It Has Been Sued.

Philip Morris, echoing the Eighth Circuit's opinion, is long on adjectives characterizing the supposedly extensive regulation to which it was subjected by the FTC. *See* Br. in

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[9] Indeed, accepting the company's belated characterization of regulated business activity as action "under color of office" would, especially if extended to other industries, render legal battles that have raged in recent years over other grounds for removal such as "complete preemption" largely beside the point as regulated industries rushed to invoke this new basis for federal jurisdiction. *See infra* pp. 19-27.

Opp. 3-6. The undisputed, public-record facts, however, fall far short of justifying those characterizations. The critical points are:

- First, and most importantly, whatever the FTC may or may not have "directed" Philip Morris to do, Philip Morris does not claim—because it cannot—that the FTC ever required it to sell "low tar" cigarettes, or compelled it to call its cigarettes "lights," or otherwise ordered it to use advertising that would mislead consumers by suggesting, on the basis of measured tar and nicotine levels, that "light" cigarettes are somehow healthier than "regular" cigarettes.
- The United States is currently suing Philip Morris and other cigarette manufacturers for precisely the conduct that Philip Morris insists in this case it undertook as an agent of the federal government acting under color of federal office. The district court in that case has rejected the defendants' argument that they were merely following FTC mandates, noting that the advertisements in which they suggested that "light" cigarettes were less hazardous "*were certainly not mandated by the FTC.*" *United States v. Philip Morris*, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) (emphasis added).
- The FTC has never promulgated regulations requiring cigarette makers to test the tar and nicotine levels of cigarettes, let alone regulations defining how such tests must be conducted, how the results must be disclosed, or how test results may be used in cigarette advertising.
- The major cigarette makers' adherence to the FTC method of testing cigarettes was the result of a voluntary agreement to stave off formal regulation and/or enforcement actions under the FTC's general authority to sanction "unfair or deceptive acts or practices in or affecting commerce" under § 5 of the FTC Act, 15 U.S.C.

§ 45(a). *See* FTC, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. 48,158 (Sept. 12, 1997).

- Absent agreement by the manufacturers to use the FTC's test method, the FTC could not, as a matter of law, foreclose use of other methods unless it could prove that advertising their results would be unfair or deceptive under the FTC Act. As the D.C. Circuit held in *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 44 (D.C. Cir. 1985), "[b]ecause the FTC has not adopted its system of testing pursuant to a Trade Regulation Rule under section 18 of the FTC Act, 15 U.S.C. § 57a (1982), one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette."
- Although Philip Morris, following the Eighth Circuit's lead, insists that the FTC "'formally defined' 'low tar' cigarettes as those measuring 15 milligrams or less in tar according to the FTC Method," Br. in Opp. 5, neither Philip Morris nor the court below can cite any FTC regulation or other "formal" action of the Commission embodying such a definition. As the Commission itself has stated, "Cigarette manufacturers use a number of descriptive terms (such as 'low tar,' 'light,' 'medium,' 'extra light,' 'ultra light,' 'ultra low,' and 'ultima') in advertising and labeling information about their cigarettes. ... *There are no official definitions for these terms* but they appear to be used by the industry to reflect ranges of FTC tar ratings." FTC, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. at 48,163 (emphasis added).
- The most that can be said is that the FTC at one point followed an *informal* enforcement policy of not taking action against cigarette companies that advertised cigarettes as "light" or "low tar" based on test results using the Cambridge method; but as Philip Morris itself acknowledges, the Commission has more recently begun

an investigation, as yet unresolved, of whether such advertising is deceptive. Br. in Opp. 6.

B. Other Industries Face Much More Extensive, Specific, and Formal Regulation than Do Cigarette Manufacturers Such as Philip Morris.

The "regulation" of cigarette testing and advertising by the FTC—which, as explained above, is virtually nonexistent—is by no means "unique," "extraordinary" or "unusual" in its intrusiveness. Federal regulatory actions are typically much more formal and prescriptive than the FTC's actions regarding cigarettes. And although it may have been "unprecedented" *for the FTC* to involve itself in product testing as it did with cigarettes (Br. in Opp. 18), detailed federal product-testing mandates are common, and are usually set forth in regulations with the force of law rather than adopted informally and by agreement with regulated companies, as in the case of the FTC's cigarette testing regime.

The Food and Drug Administration's regulation of drugs and medical devices demonstrates the fallacy of the argument that the FTC's actions concerning cigarettes constituted an unusually extensive regulatory scheme. Unlike cigarette makers, drug and medical device manufacturers must comply with detailed, legally enforceable federal standards governing the approval and marketing of new drugs and medical devices. Once approved, drugs and devices are subject to formal regulations that incorporate the formulation and design originally developed by the manufacturer, as well as the precise contents of their labels; other regulations address manufacturing practices to which their makers must conform. *See generally Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). The FDA's manufacturing standards specify how drug and device manufacturers must audit and inspect their manufacturing facilities (*see, e.g.*, 21 C.F.R. Part 820), and the agency itself conducts inspections of manufacturing facilities pursuant to its statutory authority under 21 U.S.C. § 374(a). The regulatory scheme for drugs and medical devices differs from the

FTC's cigarette testing program both in that it involves regulations with the force of law, and in that it directly regulates product design and production.

In some cases, FDA regulations also set forth detailed product testing requirements that manufacturers are legally required to follow. For instance, the FDA has promulgated a regulation prescribing in detail how surgical gloves must be tested for leaks, which calls not only for testing by manufacturers, but also for sampling and testing by the agency itself. 21 C.F.R. § 800.20. Unlike the FTC's test program for cigarettes, the FDA's testing has teeth: gloves that fail are "adulterated within the meaning of section 501(c) of the Federal Food, Drug, and Cosmetic Act, and are subject to regulatory action, such as detention ... and seizure ...." *Id.* § 800.20(d).

The FDA's glove regulation is by no means unique. Other FDA regulations provide detailed testing and labeling requirements for tampons, 21 C.F.R. § 801.430, impact-resistant eyeglass lenses, *id.* § 801.410, hearing aids, *id.* § 801.420, and condoms. *id.* § 801.435. The tampon regulation, for example, requires manufacturers to use an absorbency test conforming to the detailed descriptions and diagrams set forth in the regulatory text, and to report the results on package labels using specifically defined terms. Again, the regulation has the force of law, and any noncomplying tampons are "misbranded" within the meaning of the Food, Drug, and Cosmetic Act.

Foods, in sharp contrast to cigarettes, are subject to significant, mandatory federal regulation. Food additives (unlike cigarette ingredients) are subject to detailed federal regulations, which require formal FDA approval of the use of any additive not generally recognized as safe. *See* 21 C.F.R. Parts 170, 171. Manufacturers seeking approval of a food additive must provide detailed scientific information supporting the claim that it is safe for human consumption. *See* 21 C.F.R. 171.1. Food packages (unlike cigarette packages) must list their ingredients, provide nutritional information and comply

with other mandatory labeling requirements. *See* 21 C.F.R. Part 101. And federal agencies, including the FDA and the Agriculture Department's Food Safety and Inspection Service, conduct mandatory, not voluntary, inspection and testing programs to determine the safety of meat, poultry, eggs, seafood, and other food products. And unlike cigarettes, foods are subject to seizure by federal authorities if testing or inspection reveals them to be adulterated. *See generally* www.fsis.usda.gov/Fact_Sheets/FSIS_Food_Recalls/index.asp.

Such detailed and compulsory federal regulatory schemes are by no means confined to the food, drug, and medical device industries. The National Highway Traffic Safety Administration (NHTSA), for example, conducts its own program of crash and rollover testing of automobiles, gives vehicles one- to five-star ratings as a result, and tells car manufacturers how to use those ratings in automobile advertising. *See* www.SaferCar.gov. NHTSA's testing activities, which are far more extensive than the FTC's, are carried out under a specific statutory mandate, 49 U.S.C. § 30168, not pursuant to voluntary agreements or informally adopted policies.

Moreover, unlike the FTC, NHTSA does more than test vehicles and instruct automakers concerning the use of those test results in advertising. It also formally promulgates specific design and performance standards for vehicles, known as Federal Motor Vehicle Safety Standards (FMVSSs). Those mandatory standards, codified at 49 C.F.R. Part 571, fill approximately 700 pages of the Code of Federal Regulations. Typically, FMVSSs not only define what safety features manufacturers are required to install in vehicles and what standards of protection they must provide, but they also specify exactly how manufacturers must *measure* their performance. For example, NHTSA's standard governing seatbelts and airbags, 49 C.F.R. § 571.208, which by itself is 87 pages long, prescribes exactly what crash tests manufacturers must conduct to test their passenger protection systems, including

the speed and angle at which vehicles must be crashed, the forces that must be measured, and the precise "anthropomorphic test devices" (*i.e.*, crash-test dummies) that must be used.

Similarly, EPA regulations define exactly how automakers must test the fuel economy of their vehicles, and further provide for testing by the agency itself of a significant percentage of vehicles as a double-check on the manufacturers' own testing. *See generally* www.epa.gov/fueleconomy/index.htm; www.fueleconomy.gov/. Again, unlike the FTC's cigarette testing program, fuel economy testing is mandated by regulations with the force of law. *See* 40 C.F.R. Parts 86 & 600. And those regulations not only specify precisely how automakers must disclose fuel economy test results to consumers, but also define fleet fuel economy performance standards (CAFE standards) that the automobile industry is *required by law* to meet.[10]

Other consumer products are also subject to detailed regulatory testing regimes. Under regulations promulgated by the Department of Energy, 10 C.F.R. Part 430, manufacturers of refrigerators, freezers, dishwashers, water heaters, clothes washers and dryers, air conditioners, television sets, home heating equipment, kitchen ranges and ovens, fluorescent light tubes, showerheads, faucets, and toilets must use prescribed test methods to measure the energy and water consumption of their products. And unlike the FTC's cigarette testing program, the Energy Department's regulations not only require product testing, but also require that the products meet specific energy and water conservation standards.

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[10] By contrast, although the FTC opened a cigarette testing laboratory using the Cambridge Filter Method in 1967, *see* FTC, *Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11,178 (1967), that laboratory was closed in 1987 when most testing of tar and nicotine levels was turned over to a private laboratory funded by the tobacco companies themselves. *See* 62 Fed. Reg. 48,158 n.5.

The Consumer Product Safety Commission (CPSC), in addition to engaging in voluntary efforts to improve product safety similar to the FTC's interactions with cigarette companies, also promulgates mandatory safety standards for consumer products, ranging from bicycle helmets to lawn mowers to cigarette lighters to baby cribs. Mandatory CPSC standards are formally promulgated as regulations and published in 16 C.F.R. Chapter II. Typically, they set forth design and/or performance standards that manufacturers are required to meet and specify the exact test methods that must be used to determine compliance.

The CPSC's standards for flammability of children's sleepwear (sizes 7 through 14) are illustrative. The standards, set forth at 16 C.F.R. Part 1616, occupy 30 pages of the Code of Federal Regulations, and specify not only what criteria affected products must meet and how they must be labeled, but also how manufacturers must sample fabric for testing, how the testing must be conducted (including eight pages of engineering drawings describing the test chamber), what records the manufacturer must keep, the Commission's enforcement policy, the role of the Commission itself in testing, and the consequences of noncompliance. As to the latter, the regulations state that "[t]he Commission will test fabrics and garments subject to the standard for compliance with the standard ... [and] will consider any failing results from compliance testing as evidence of a violation of the standard and section 3 of the Flammable Fabrics Act (15 U.S.C. § 1192)." 16 C.F.R. § 1616.35(f).

Financial institutions also operate under detailed federal regulatory regimes. Agencies such as the Federal Reserve, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision extensively supervise the activities of banks and

savings associations.[11] Federal regulation of these institutions involves not only the promulgation of mandatory standards governing their soundness and the types of activities they may undertake, but also examination of banks by federal officers. Unlike cigarette testing, bank examination is carried out directly by the responsible federal agencies, and it is mandatory, not voluntary. And findings made by bank examiners may lead to consequences far more drastic than anything associated with the FTC's limited tar and nicotine testing regime, including removal of the financial institution's management, placement into federal receivership, and liquidation.

As a final example, the Occupational Safety and Health Administration (OSHA), pursuant to the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq., formally promulgates regulations requiring employers to limit the exposure of their workers to hazardous substances and conditions. Those standards, which have the force of law, typically specify not only precise exposure limits, but also means of compliance and specific methods for exposure testing. For example, OSHA's recently promulgated rule on exposure to hexavalent chromium, 71 Fed. Reg. 10,100 (Feb. 28, 2006), not only prescribes a precise exposure limit (5 micrograms of hexavalent chromium per cubic meter of air as an eight-hour time-weighted average), but also defines exactly the testing that employers must use to determine compliance: "the employer shall use a method of monitoring and analysis that can measure chromium (VI) to within an accuracy of plus or minus 25 percent (+/- 25%) and can produce accurate measurements to within a statistical confidence level of 95 percent for airborne concentrations at or above the action level." *Id.* at 10,375. In addition to requiring employers to monitor their compliance

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[11] An overview of federal financial institution regulation and the roles of the various agencies involved may be found at www.federalreserve.gov/pf/pdf/pf_5.pdf.

using specified methods, OSHA itself periodically tests employer compliance, and violation of its regulations can result in administrative sanctions.

We could go on. The point is that federal regulation of business activity is ubiquitous, and regulations that impose detailed testing and compliance requirements are commonplace. Indeed, if anything is "unique" and "unusual" about the FTC's testing of cigarettes, it is that it has *not* been imposed by regulations with the force of law, that it does *not* involve enforcement of any design or performance standards regarding the regulated products, and that it involves *no* enforceable regulations concerning the use of test results in cigarette advertising or marketing. No one who understood federal regulation could possibly credit Philip Morris's (and the Eighth Circuit's) view that the "regulation" of cigarette companies by the FTC is "uniquely," "extraordinarily," or even "unusually" extensive. When compared to most other modern regulatory regimes, just the opposite is true.

C. Whether Broadly or Narrowly Applied, the Eighth Circuit's Ruling Will Have Mischievous Consequences.

Precisely because the federal "regulation" of cigarette testing and marketing has been so feeble compared to other federal regulatory regimes that impose enforceable legal requirements on their subjects, affirmance of the Eighth Circuit's ruling would likely lead other regulated businesses who are sued by consumers injured by their products to claim that they, too, "acted under" a federal officer. Indeed, medical device manufacturers have already done so, *see Parks v. Guidant Corp.*, 402 F. Supp.2d 964 (N.D. Ind. 2005), as have banks claiming to be acting under federal officers by virtue of federal regulation of their lending practices. *See King v. Provident Bank*, 428 F. Supp. 2d 1226 (M.D. Ala. 2006).

The range of state-law tort actions potentially subject to claims of removal is virtually unlimited, but the regulations described above provide a number of illustrations, including:

- Actions against manufacturers of drugs and medical devices alleging design or manufacturing defects or failure to disclose risks associated with use of the products;
- Actions against automobile manufacturers alleging defective design, manufacture or testing of safety equipment;
- Consumer fraud actions involving improper disclosure of energy consumption figures for vehicles and other consumer products;
- Personal injury actions against manufacturers or sellers of virtually any product subject to regulation by the CPSC;
- Actions by consumers sickened or injured by contaminated or unsafe foods or food additivies;
- Consumer fraud actions based on misleading labeling of the contents or nutritional qualities of foods;
- Consumer or commercial fraud actions involving bank transactions.

Thus, if this Court were to leave the Eighth Circuit's decision intact, a number of undesirable consequences would be likely. Courts that conscientiously applied the principle that regulation, if extensive enough, can justify removal, and that undertook a serious comparison of the degree of regulation faced by defendants in other industries with that faced by cigarette companies, might allow a broad range of defendants to remove cases under § 1442(a)(1), dramatically expanding the scope of federal removal jurisdiction in a manner having nothing to do with the statute's purpose of protecting federal officers in the performance of their official duties.

Alternatively, it is possible that this Court, or lower courts, might grasp at the lifeline offered by the Eighth Circuit's characterization of the Philip Morris case as "unique," "unusual," "extraordinary," and "unprecedented," and use it to reject removal by defendants outside the cigarette industry even though, in reality, they face regulations much more extensive than cigarette companies. But even if courts declined to extend removal to other industries, much time and effort would be expended litigating meritless removals. And, at the end of the day, the cigarette companies would be left with a special benefit not available to other more heavily regulated industries. A decision resulting in an unprincipled exception to ordinary jurisdictional rules for the benefit of a single industry should not be allowed to stand by this Court.

CONCLUSION

For the reasons stated above, and by the petitioner, the Eighth Circuit's decision should be reversed, and the case remanded with directions that it be remanded to the state court in which it was filed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE PUBLIC JUSTICE, P.C., AMERICAN ASSOCIATION FOR JUSTICE, AND CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a private corporation sued related to its marketing of cigarettes is "acting under [a federal] officer" and "under color of such office" for purposes of removal jurisdiction under 28 U.S.C. § 1442(a)(1), when that corporation does not assert a federal defense based on its active participation in federal law enforcement, and relies solely on the type of federal preemption defense which this Court has held is otherwise insufficient to invoke removal jurisdiction.

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INTEREST OF *AMICI CURIAE*

Public Justice, P.C., the American Association for Justice, and the Consumer Attorneys of California submit this brief as *amici curiae* in support of Petitioners, urging this Court to hold that Respondent Philip Morris Companies, Inc. (hereinafter "Philip Morris") does not assert a federal law defense that can support removal of a case under the "federal officer removal statute," 28 U.S.C. § 1442(a)(1).[1]

Public Justice, P.C. ("Public Justice"), which recently shortened its name from "Trial Lawyers for Public Justice, P.C." is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating in the federal and state courts, Public Justice prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice has fought federal preemption in numerous state court cases. *See, e.g., Sprietsma v. Mercury Marine*, 197 Ill.2d 112 (2001), *rev'd, Sprietsma v. Mercury Marine Corp.*, 537 U.S. 51 (2002). Public Justice is concerned that, if the decision below is upheld, plaintiffs may be deprived of their choice of

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[1] Letters granting blanket consent to the filing of *amicus curiae* briefs have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

forum in any case involving a federal preemption defense and the federal courts will be overburdened, causing substantial delays in consumers' access to justice.

The American Association for Justice ("AAJ"), known until Dec. 2006 as the Association of Trial Lawyers of America, is a voluntary national bar association. AAJ's approximately 55,000 members practice in state courts throughout the country, primarily representing plaintiffs in personal injury suits, civil rights and employment discrimination cases, and worker injury actions. AAJ's mission includes the protection of the health and safety of all Americans through the development of law and preservation of the right to trial by jury guaranteed by the Constitution. AAJ believes that the ramifications of potentially placing large numbers of state law actions into at times distant federal courts may result in an unwarranted denial of Americans' fundamental right to legal recourse for injury.

The Consumer Attorneys of California is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. The Consumer Attorneys of California has taken a leading role in advancing and protecting the rights of injured consumers in both the courts and the legislature.

The decision below implicates *amici*'s concerns in a number of respects, one of which is the focus of this brief.

Amici often have advocated before this and other courts against expansive assertions of federal preemption doctrines that would prevent consumers and injury victims from vindicating their rights under state law to seek damages and other relief. State courts have long been the primary guardians of these state-law rights, and federal law consistently has been construed to respect the vital role played by state courts. Even where defendants invoke federal preemption, this Court has been steadfast in holding that cases may not be removed from state to federal court based on an asserted federal defense, and that state courts are equally competent to decide these defenses. The decision below upends this settled rule of law by allowing a private corporate defendant to remove a case after merely asserting a possible preemption defense based upon its alleged compliance with federal regulations. *Amici* submit this brief urging reversal.

STATEMENT OF FACTS

In April 2003, Lisa Watson and Loretta Lawson filed a putative class action against Philip Morris, the seller of millions of packs of cigarettes in the state of Arkansas, alleging that Philip Morris had violated the Arkansas Deceptive Trade Practices Act in selling its Marlboro Lights cigarettes in Arkansas (Counts I and II). *See* Ark. Code Ann. §§ 4-88-101, *et seq.* Pet. App. 62a-73a (First Amended Complaint). They brought this case exclusively on behalf of individuals who purchased cigarettes within the state of Arkansas. Pet. App. 68a (First Amended Complaint, ¶ 27). At the time it was filed, there was no basis for Philip Morris to remove this action pursuant to the diversity removal statute, 28

U.S.C. § 1332,[2] so in order to access its preferred federal forum Philip Morris based its removal solely on 28 U.S.C. § 1442(a)(1), the federal officer removal statute. Pet. App.74a-97a (Notice of Removal).

The federal officer removal statute allows a defendant to remove an otherwise unremovable civil or criminal case when the defendant is a United States officer "or any person *acting under that officer,*" so long as he or she is sued "for any act *under color of such office.*" 28 U.S.C. § 1442(a)(1) (emphases supplied). In support of its removal petition, Philip Morris asserted that when it sold its Marlboro Lights cigarettes within the state of Arkansas, it was "acting under" an officer of the U.S. Federal Trade Commission ("FTC") and selling its cigarettes "under color of" the FTC simply because it was subject to a federal regulatory regime that circumscribed when it could sell its privately manufactured products to the general public.

Recognizing that the statute has been held to impose a requirement that the removing federal officer assert a "colorable federal defense" based upon official actions, Philip Morris contended that it would defend the action against it by demonstrating that "Watson's and Lawson's state law claims were preempted by Section

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[2] The recently enacted Class Action Fairness Act, Pub. L. 109-2, 119 Stat. 4, amended 28 U.S.C. § 1332 to "confer[] federal diversity jurisdiction over class actions where the aggregate amount in controversy exceeds $5,000,000," and thereby "abrogates the rule against aggregating claims." *Exxon Mobil Corp. v. Allapattah Serv's,* 545 U.S. 546, 571 (2005). If filed today, this case would likely be removed by Philip Morris pursuant to 28 U.S.C. § 1332.

Five of the Federal Cigarette Labeling and Advertising Act." *Watson v. Philip Morris Co's, Inc.*, 420 F.3d 852, 862 (8th Cir. 2005). In response, the Eighth Circuit cursorily addressed whether this assertion by Philip Morris fulfilled the requirement of a "federal defense." The Eighth Circuit dispensed with this requirement in a few short sentences by holding that "the threshold is quite low" for a federal defense and, therefore, it had "no hesitation in concluding that Philip Morris in its Notice of Removal, has set forth a colorable federal defense . . ." *Id.* at 863.

SUMMARY OF ARGUMENT

This Court has consistently held that district courts are by design courts of limited jurisdiction. Under the general removal statute, 28 U.S.C. § 1441, Congress, by permitting removal only when a district court has original jurisdiction, has made "the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, this Court has decided that a defendant's assertion of a preemption defense does not create federal jurisdiction when a plaintiff's claims are based, as herein, entirely upon state law. *Id.* at 393.

The decision below turns this longstanding jurisprudence on its head. Instead of keeping the jurisdiction of federal courts limited, the Eighth Circuit drastically expanded that jurisdiction by construing the federal officer removal statute, 28 U.S.C. § 1442(a)(1), to allow a private corporate defendant to remove any case where state-law claims challenge its conduct, so long as that defendant asserts that its compliance with federal

regulations give rise to a "colorable" preemption defense. Given the pervasiveness of federal regulation in the modern economy, upholding this ruling would essentially transform the federal courts into courts of general jurisdiction over private corporate conduct.

The Eighth Circuit's interpretation of 28 U.S.C. § 1442(a)(1) is incorrect. The federal officer removal statute does not overturn the rule that state courts are competent to handle actions based upon state law where private corporate defendants merely assert preemption defenses. By allowing the defense of preemption to fulfill one of the prerequisites for removal under 28 U.S.C. § 1442(a)(1), the Eighth Circuit ignored the fundamental purpose and intent of the statute. As this Court has repeatedly stated, the federal officer removal statute was designed to apply to "cases where federal officers can raise a colorable defense *arising out of their duty to enforce federal law.*" *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969) (emphasis added). As a result, this Court has limited the type of federal defenses that may support removal to those directly arising out of the active enforcement of federal law, principally immunity defenses. Philip Morris's preemption defense bears no relationship to this statutory purpose. Philip Morris does not and cannot allege that it was engaged in federal law-enforcement when it privately manufactured and sold "light" cigarettes.

Since Philip Morris's preemption defense has nothing to do with the removal statute's purpose of protecting federal officials and those acting under color of their authority to enforce federal law, the decision below should be reversed. Instead, this Court should hold that removal pursuant to 28 U.S.C. § 1442(a)(1) is

limited to those instances where federal immunity defenses are being asserted in response to state prosecutions which may impede the active *enforcement* of federal law by or under the auspices of a federal officer.

ARGUMENT

The Eighth Circuit failed to acknowledge that this Court has discussed applicable federal defenses under 28 U.S.C. § 1442(a)(1) exclusively in the context of cases involving actual federal officers who were asserting official immunity defenses. This Court has never held that a defense other than an asserted immunity defense will support removal under the statute. For the reasons discussed below, this Court should hold that asserted defenses unrelated to the enforcement of federal law do not support removal under the statute.

I. IT IS WELL SETTLED THAT PREEMPTION DEFENSES DO NOT CREATE FEDERAL JURISDICTION UNDER THE GENERAL REMOVAL STATUTE, 28 U.S.C. § 1441

This Court has often reiterated that the district courts of the United States "are 'courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.'" Exxon-Mobil Corp., 545 U.S. at 552 (quoting *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)). This rule embodies the "'due regard for the rightful independence of state governments, which should actuate federal courts, [by requiring] that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'" *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 18 (2003) (Scalia, J. dissenting) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

Thus, under the general federal removal statute, 28 U.S.C. § 1441(a), unless otherwise provided by Congress, a defendant may only remove a "civil action brought in a State court of which the district courts of the United States have original jurisdiction." Congress's requirement of original jurisdiction means that a question of federal law "must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." *Gully v. First National Bank*, 299 U.S. 109, 113 (1936). When a federal law defense does not appear on the face of a plaintiff's complaint, that defense cannot create removal jurisdiction. *See, e.g., Caterpillar*, 482 U.S. at 392 ("The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.").

There is no exception made for the assertion of the federal defense of preemption, as the abiding respect for the authority of state courts has long compelled the recognition of state court competence to resolve preemption defenses. *See, e.g., Chik Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988) ("[W]hen a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court."). Further, even where a defendant asserts "field preemption," alleging that Congress has displaced state law by occupying an entire field of regulation, state courts are still deemed fully competent to patrol the borders of such occupied fields by resolving these defenses. *See, e.g., Caterpillar*, 482 U.S. at 398-99 (holding that state court must decide preemption defense based on field-preemptive statute); *cf. Amalgamated Clothing Workers of America v. Richman Brothers Co.*, 348 U.S. 511, 517-19 (1955) (directing party to raise defense in state court). In fact, state courts handle questions of

"preemption" so often that a Lexis/Nexis search of written decisions reveals that the subject of "preemption" was discussed in at least 457 state court cases in 2006, 440 in 2005, and 448 in 2004.

Even the small set of cases involving "complete preemption" do not undermine this rule. In those cases, this Court has held that a "complete preemption" argument will support removal only if Congress has created not just a federal defense to state-law claims but also an exclusive cause of action under federal law. *See, e.g., Beneficial Nat'l Bank*, 539 U.S. at 9-10 (holding that National Bank Act, 12 U.S.C. § 86, creates exclusive cause of action allowing removal of case involving state-law usury claims against national bank); *id.* at 6-8 (describing similar holdings based on provisions in the National Labor Relations Act, 29 U.S.C. § 185, and Employee Retirement Income Security Act, 29 U.S.C. § 1132). Yet, even in those cases, this Court has been careful to distinguish complete preemption from the general rule that preemption *defenses* alone do not support removal. *See, e.g., Beneficial Nat'l Bank*, 539 U.S. at 9 ("The section [12 U.S.C. § 85] would therefore provide the petitioners with a complete federal defense. Such a federal defense, however, would not justify removal.").[3] As this Court concluded in *Caterpillar*:

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[3] *See also Sullivan v. American Airlines, Inc.*, 424 F.3d 267, 272-73 (2d Cir. 2005) ("The complete-preemption doctrine must be distinguished from ordinary preemption, also known as defensive preemption. Many federal statutes - far more than support complete preemption - will support a defendant's argument that because federal law preempts state law, the defendant cannot be held liable under state law. . . . The Supreme Court has left no doubt, however, that a

> [T]he presence of a federal question . . . in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule - that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. . . . [A] *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing.

482 U.S. at 398-99 (emphasis in original).

It is thus well settled that federal preemption defenses by themselves do not create removal jurisdiction. The only remaining question, then, is whether Congress, in enacting 28 U.S.C. § 1442(a)(1), "otherwise expressly provided," *id.*, that the federal officer removal statute should override this general, well-

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plaintiff's suit does not arise under federal law simply because the defendant may raise the defense of ordinary preemption.") (citations omitted); *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 355 (3d Cir. 1995) ("State law claims which fall outside the scope of [ERISA] § 502, even if preempted by § 514(a), are still governed by the well-pleaded complaint rule and, therefore, are not removable under the complete-preemption principles established in *Metropolitan Life* [*Ins. Co. v. Taylor*, 481 U.S. 58- (1987)].").

considered rule. Although 28 U.S.C. § 1442(a)(1) creates a narrow exception to 28 U.S.C. § 1441's "well-pleaded complaint rule," for the reasons that follow it is clear that the federal officer removal statute was never intended to permit removal outside of the context of federal law enforcement.

II. REMOVAL UNDER 28 U.S.C. § 1442(a)(1) SHOULD ONLY BE AVAILABLE WHERE THE ASSERTED FEDERAL DEFENSE INVOLVES PARTICIPATION IN FEDERAL LAW ENFORCEMENT.

A. The Purpose of the Federal Officer Removal Statute Is to Secure a Federal Forum for Parties Engaged in Federal Law Enforcement.

The primary purpose of the federal officer removal statute has always been to prevent states from using their own court systems to interfere with the federal government's enforcement of federal laws. This underlying purpose has been at the heart of every one of this Court's decisions applying the statute for over a century. For instance, in *Tennessee v. Davis*, 100 U.S. 257 (1880), this Court explained:

> [The United States government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess . . ., the operations of the

> general government may at any time be arrested at the will of one of its members.

Id. at 263; *see also International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 85-86 (1991) (official immunity defense "was resolved by examining whether an officer's challenged actions exceeded the powers the sovereign had delegated to him. Determining whether a federal officer had acted *ultra vires* was fraught with difficulty and subject to considerable manipulation.") (citation omitted); *Willingham*, 395 U.S. at 406 (reiterating that the federal interest supporting removal under this act is "the very basic interest in the enforcement of federal law through federal officials").

Further, this Court has consistently held that giving federal courts the right to resolve federal officers' official immunity defenses in response to state-law prosecutions prevents those prosecutions from unfairly hindering federal law enforcement. Thus, although the Eighth Circuit correctly stated that this Court has held that "the Defendant need only raise a colorable federal defense" and that removal should not be frustrated by a "narrow, grudging interpretation," *Watson*, 420 F.3d at 856, 863 (citing *Willingham*, 395 U.S. at 407, and *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)), the court below ignored the fact that this Court has only discussed federal defenses that "aris[e] out of [an officer's] duty to enforce federal law." It is singularly the threat that state prosecution may impede federal law enforcement operations that has undergirded both "the validity of the defense of official immunity tried in a federal court" and this Court's broad statements regarding removal jurisdiction. *Willingham*, 395 U.S. at 407; *Jefferson County*,

527 U.S. at 431 (quoting *Willingham*); *id.* at 447 (Scalia, J. concurring in part and dissenting in part) ("The point is only that the officer should have to identify as the gravamen of the suit an act that was, if not required by, at least closely connected with, the performance of his official functions."); *Mesa v. California*, 489 U.S. 121, 137 (1989) ("Congress' enactment of federal officer removal statutes since 1815 served 'to provide a federal forum for cases where federal officials must raise defenses arising from their official duties.'") (quoting *Willingham*, 395 U.S. at 405)); *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981) ("Historically, removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties."). Removal under this statute thus has always been predicated upon a defendant's colorable allegation that he or she was engaged in federal law *enforcement* activity at the time of the alleged conduct upon which suit has been brought.

Indeed, to date every case this Court has decided addressing this statute has involved the assertion of official immunity defenses by actual federal government officials. For example, in *Davis*, 100 U.S. at 260, it was a federal revenue collector who sought removal ("[T]he act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of his duties as deputy collector."); in *Willingham*, 395 U.S. at 409, removal was sought by on-duty federal prison officers ("Petitioners sufficiently put in issue the questions of official justification and immunity[.]"); in *Maryland v. Soper*, 270 U.S. 9, 34 (1926), removal was sought by four prohibition agents and their chauffeur accused of murder ("In invoking the protection of a trial of a state offense in a federal court under § 33, a federal

officer abandons his right to refuse to testify because accused of crime, at least to the extent of disclosing in his application for removal all the circumstances known to him out of which the prosecution arose. The defense he is to make is that of his immunity from punishment by the state, because what he did was justified by his duty under the federal law . . ."); and in *Colorado v. Symes*, 286 U.S. 510, 518 (1932), removal was sought by a prohibition agent accused of murder ("Federal officers and employees are not, merely because they are such, granted immunity from prosecution in state courts for crimes against state law."). In each of these cases, the defendant(s) argued that the lack of a federal venue in which to present their immunity defense could potentially result in dire consequences for them.

By contrast, Philip Morris makes no claim that it needs to be protected from adverse consequences if its defense is scrutinized within a state court system. Rather than arguing immunity based upon participation in federal law enforcement, Philip Morris merely argues that there may be a conflict between state and federal law when it allegedly complied with federal regulations in the process of privately manufacturing its cigarettes and choosing to sell them within the state of Arkansas.[4]

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4 Philip Morris' asserted preemption defense here is a far cry from the federal immunity defenses which have been asserted by private parties where removal under this statute has at times been upheld. *See, e.g., Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1427-28 (11th Cir. 1996) (immunity defense by designated airplane inspector of Federal Aviation Administration); *Venezia v. Robinson*, 16 F.3d 209, 211-12 (7th Cir. 1994) (immunity and justification defenses by participant in FBI sting operation); *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 484-86 (1st Cir. 1989)

However, such a preemption defense is precisely the type of defense that state courts have repeatedly been deemed more than competent to resolve.

B. In Order to Effectuate the Underlying Purpose of the Federal Officer Removal Statute and Prevent a Massive Expansion of Federal Court Jurisdiction, This Court Should Expressly Limit Removal Jurisdiction Under 28 U.S.C. § 1442(a)(1) to Cases Presenting Defenses Based Upon Participation in Federal Law Enforcement.

By arguing for an expansive inclusion of all federal defenses within the umbrella of the statute, Philip Morris seeks to make this statute the exception that swallows the rule of limited federal court jurisdiction. This Court has long held that statutes addressing removal jurisdiction should be construed narrowly and strictly out of respect for the independence of state courts. *See, e.g., Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation."). Indeed, as explained above, this statute should only be read expansively when federal officers argue they are enforcing federal law as part of their official duties. The Eighth Circuit's contrary conclusion, which allows removal based on any "colorable federal defense," *Watson*, 420 F.3d at 862-863 ("the threshold is quite low"), rests on the absurd

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(defenses by telephone company participating in federal wiretapping investigation). In these cases, the defendants obtaining removal had colorable defenses based on their alleged actual participation in federal law enforcement.

premise that the federal officer removal statute was intended to provide an exclusive federal forum for a defense that a federal officer himself could hardly ever assert! This Court should reject such a plainly overbroad reading of the statute.

Rather, in order to effectuate the statute's underlying purpose of preventing state interference with federal law enforcement, while at the same time preserving the longstanding principle that federal courts are courts of limited jurisdiction, this Court should clarify the types of federal defenses that the statute is intended to protect: namely, those defenses that arise out of a federal officers' law enforcement responsibilities. Such a bright line rule would appropriately preserve the removal statute's underlying purposes while at the same time stemming the recent tide of removals based on asserted compliance with all manner of federal regulatory schemes. *See, e.g., Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838, 852-53 (S.D. Ill. 2006) (rejecting window-blinds manufacturer's removal based on asserted compliance with Consumer Product Safety Commission regulations); *King v. Provident Bank*, 428 F. Supp. 2d 1226, 1231-32 (M.D. Ala. 2006) (rejecting bank's removal based on asserted compliance with Truth In Lending Act regulations); *Parks v. Guidant Corp.*, 402 F. Supp. 2d 964, 969-70 (N.D. Ind. 2005) (rejecting removal based on medical device manufacturer's asserted compliance with FDA regulations); *In re MTBE Products Liability Litigation*, 342 F. Supp. 2d 147, 158-59 (S.D.N.Y. 2004) (allowing removal based on gasoline additive manufacturer's asserted compliance with EPA directives); *Guckin v. Nagle*, 259 F. Supp. 2d 406, 416-18 (E.D. Pa. 2003) (rejecting medical device manufacturer's

removal based on asserted compliance with FDA regulations).

As the removals in these cases demonstrate, if Philip Morris's preemption defense here can support removal under the federal officer removal statute, then removal to federal court will become the norm in virtually all cases involving state-law claims against companies in regulated industries. There is no support for this massive expansion of federal court jurisdiction in either the text or underlying rationale behind the federal officer removal statute. Decades of this Court's decisions counsel exactly the opposite result, authorizing plaintiffs rather than defendants to determine both the nature of the claims at issue and the forum in which those claims may be heard.

This Court, therefore, should hold that a defendant seeking removal under 28 U.S.C. § 1442(a)(1) must assert a colorable federal immunity defense that is based on its participation in the actual enforcement of federal law. Absent a federal defense that implicates § 1442(a)(1)'s true purpose, the general rule prohibiting removal in the face of a "well-pleaded complaint" should apply.

CONCLUSION

For the reasons stated herein, the Eighth Circuit's decision should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION, AND PHILIP MORRIS, INC., A CORPORATION, RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a private actor doing no more than complying with federal regulations is a "person acting under a federal officer" for the purpose of 28 U.S.C. §1442(a)(1), entitling the actor to remove to federal court a civil action brought in state court under state law.

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INTEREST OF THE *AMICI CURIAE*

This case asks whether a private entity subject to "detailed" and "comprehensive" federal regulation may, on that ground alone and pursuant to 28 U.S.C. §1442(a)(1), remove to federal court a lawsuit against it raising exclusively state law claims.

Amici States have a critical interest in this matter. State courts exercise general jurisdiction and are entrusted to resolve federal defenses like the preemption defense asserted by respondents here. By permitting private entities sued in state court to remove their suits to federal court solely because they are federally regulated and claim federal preemption, the Eighth Circuit upset the division of labor between state and federal courts. The Eighth Circuit's decision cannot be reconciled with the text of §1442(a)(1) and prior decisions of this Court, and offends settled principles of comity and federalism.

The Eighth Circuit's dramatic expansion of federal removal jurisdiction, moreover, threatens the States' fundamental interest in the enforcement of consumer protection acts and other state laws. Consumer fraud statutes, like the Arkansas law at issue here, depend upon judicial interpretation for their development. But federal court construction of state law is not binding on state courts, and state law claims removed to federal court deprive state courts of the chance to develop state law and clarify its requirements. In addition, federal courts are openly hesitant to develop the contours of state law without clear guidance from state courts. Finally, even if plaintiffs succeed in remanding some cases to state court, removals encouraged by the Eighth Circuit's rule will add needlessly to the time and expense of litigating important, public law claims.

STATEMENT

1. Petitioners Lisa Watson and Loretta Lawson, on behalf of a putative class of Arkansas cigarette smokers, filed suit

against respondents in Arkansas state court. Pet. App. 20a, 23a. The suit alleged that respondents violated the Arkansas Deceptive Trade Practices Act by misleadingly marketing certain brands as "light" cigarettes with less tar and nicotine. *Id.* at 63a-66a, 68a-72a. Petitioners further claimed that respondents engineered these brands so that the machines used to test their tar and nicotine content would register lower levels than smokers actually received. *Id.* at 63a-65a, 69a-70a.

2. Respondents removed the lawsuit to federal district court, invoking 28 U.S.C. §1442(a)(1), which authorizes removal by a federal officer or "any person acting under" an officer who is "sued in an official or individual capacity for any act under color of such office." Pet. App. 74a. Respondents claimed that they were "acting under" a federal officer within the meaning of §1442(a)(1) because the Federal Trade Commission ("FTC") "has extensive authority to monitor and regulate virtually all aspects of cigarette advertising" and requires respondents to employ the mechanical testing method whose results petitioners challenge as misleading. Pet. App. 76a, 78a.

The district court denied petitioners' motion to remand the suit to state court. Pet. App. 20a. The court identified four requirements for removal under §1442(a)(1): (1) respondents "must have acted under the direction of a federal officer"; (2) they must "raise a 'colorable' federal defense to [petitioners'] claims"; (3) they must show "a causal nexus between [these] claims and the acts [respondents] performed under color of federal office"; and (4) they must be "persons" for purposes of the statute. Pet. App. 35a. The district court disagreed with petitioners' contention that respondents failed to satisfy two of these elements—the need to "act[] at the direction of a federal officer," and the need for "a causal nexis" between petitioners' claims and actions respondents took under federal direction. *Id.* at 35a-36a.

As to the first, the district court held that respondents "acted under" the FTC because the agency has regulated "cigarette testing and advertising" for "over forty years" with "detailed and specific" requirements. Pet. App. 41a. The court cited a 1970 letter agreement, entered into in lieu of formal FTC regulation, in which cigarette manufacturers agreed to disclose tar and nicotine levels in all of their advertising. *Id.* at 25a-26a, 41a. The court also relied on the fact that the FTC itself performed the tar and nicotine tests for many years, and that it retains the power to oversee and monitor private testing, which continues to follow the FTC's prescribed methodology, the Cambridge Filter Method. *Id.* at 27a, 41a-42a. Finally, the court relied on a collection of FTC actions against individual companies and a 1978 advisory opinion as evidence that, in the FTC's view, conduct "contrary to the 1970 [letter] agreement and advertising inconsistent with" the FTC's prescribed testing methods was "deceptive advertising in violation" of federal law. *Id.* at 42a.

Turning to causation, the district court found a sufficient nexus between petitioners' claim that respondents had manipulated their product to fool the FTC's testing method and the agency's demand that companies use the results of that method in their advertising. Pet. App. 42a-43a. The court deemed it material that the FTC is aware that the Cambridge Filter Method permits "the very inaccuracies" that petitioners allege in their complaint, yet continues to require testing under that method. *Id.* at 43a.

3. The district court certified its order for interlocutory appeal, Pet. App. 59a-60a, and the Eighth Circuit affirmed. The court determined that respondents operated under sufficiently "comprehensive, detailed [FTC] regulation" to be "acting under" federal authority for purposes of §1442(a)(1). Pet. App. 8a. Like the district court, the court of appeals cited the FTC's requirement that companies test tar and nicotine content using

the Cambridge Filter Method, and that the FTC formerly performed this test and that today's private testing remains subject to FTC inspection and verification. *Id.* at 3a, 8a-9a. And while recognizing that the 1970 letter agreement was voluntary on the part of participating manufacturers, *id.* at 9a, the court found the agreement sufficiently "coercive" because companies entered into it on the threat of more formal regulation, and also because companies that violate the agreement's terms risk FTC action for deceptive advertising. *Id.* at 10a-11a.

The Eighth Circuit further found the required "causal connection" between "the federal officer's direction and control" and "the acts challenged in the plaintiff's complaint." Pet. App. 14a. According to the court, because petitioners challenged respondents' advertising, "[i]t cannot seriously be argued that the FTC does not direct and control the advertising of cigarettes." *Ibid.* The court cited a 1971 consent order between the FTC and another cigarette manufacturer, American Brands, Inc., in which the agency indicated that it was misleading to advertise using terms like "low" or "reduced" without disclosing tar and nicotine levels as determined by the Cambridge Filter Method. *Id.* at 15a. The court found a sufficient nexus between these FTC requirements and petitioners' "claim that this grouping of test results and descriptors renders advertising deceptive." *Id.* at 16a.

Judge Gruender concurred and wrote separately "to emphasize that [the court's] decision * * * should not be construed as an invitation to every participant in a heavily regulated industry to" remove suits to federal court. Pet. App. 18a. In most cases, Judge Gruender wrote, "a contract, principal-agent relationship, or near-employee relationship with the government will be necessary." *Ibid.* The concurrence stressed that it is the "extraordinary" level of FTC control that makes this case different. *Ibid.*

SUMMARY OF ARGUMENT

In the decision below, the Eighth Circuit dramatically expanded removal jurisdiction under 28 U.S.C. §1442(a)(1). That provision permits private parties to remove suits to federal court only when they act on behalf of federal officers. The Eighth Circuit's rule, by contrast, authorizes removal by any private party subject to sufficiently "detailed" and "comprehensive" federal regulation.

For the reasons set forth by petitioner and the United States, the Eighth Circuit's interpretation of §1442(a)(1) cannot be reconciled with the text, structure, purposes, or history of the statute. And for the reasons set forth below, the Eighth Circuit's interpretation offends principles of comity and federalism. Federal courts "scrupulously confine their own jurisdiction" within statutory limits. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (internal quotations omitted). The Eighth Circuit's decision ignores this limitation on federal judicial power and erroneously authorizes defendants to remove a host of cases raising exclusively state law claims.

In addition, if allowed to stand, the Eighth Circuit's interpretation of §1442(a)(1) will undercut protections guaranteed by state law. The Eighth Circuit's rule channels a new class of lawsuits into federal court under a removal standard that is not only "somewhat amorphous" (in the district court's words, Pet. App. 41a), but also extremely permissive, considering the broad spectrum of activity governed by federal rules that are at least as "detailed" and "comprehensive" as the informal FTC directives that respondents invoked to justify removal. Because federal court interpretations of state law are not binding in state court, resolving state law disputes in the federal system—particularly disputes that hinge on novel or unresolved questions of state law—slows the development of state legal doctrine and could foster inconsistency. In addition,

federal courts are loathe to develop state law beyond the bounds effected by existing state court precedent. Suits removed to federal court are therefore less likely to afford citizens as much protection as would be available in state court.

Defendants in other industries subject to federal regulation have already invoked the Eighth Circuit's decision to remove state law claims to federal court. And even if such cases are ultimately remanded to state court, removal adds significantly to the time and expense of litigating state law claims. This wasteful collateral litigation is harmful in its own right, and by diminishing the prospective value of state law claims, it discourages would-be private plaintiffs, who play an important role in vindicating state law rights and deterring their violation.

Amici States respectfully urge this Court to reverse the Eight Circuit's judgment and hold that federal officer removal under §1442(a)(1) does not apply merely because a defendant operates pursuant to federal regulation, even the alleged "detailed, comprehensive" regulation of the type found by the Eighth Circuit here.

ARGUMENT

I. The Eighth Circuit's Interpretation Of Section 1442(a)(1) Upends Settled Principles Of Comity And Federalism.

States retain the power "to provide for the determination of controversies in their courts," and that power "may be restricted only by the action of Congress in conformity with the Judiciary Articles of the Constitution." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941). Both Congress and this Court have appropriately cabined federal jurisdiction in line with this principle. The "dominant note" in successive congressional enactments regarding the scope of diversity jurisdiction has been "one of jealous restriction, of avoiding

offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of business that intrinsically belongs to the state courts." *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941) (internal quotations omitted); see also *Shamrock Oil & Gas Corp.*, 313 U.S. at 108 ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [removal] legislation."). Likewise, this Court has admonished lower federal courts to "scrupulously confine [their] own jurisdiction to the precise limits which [the jurisdictional] statute has defined," with "[d]ue regard for the rightful independence of state governments." *Shamrock Oil & Gas Corp.*, 313 U.S. at 109 (internal quotations omitted).

Consistent with this restrictive notion of federal jurisdiction, the "well-pleaded complaint rule" limits federal question jurisdiction to cases where the federal question appears "on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Federal defenses, including preemption, do not give rise to federal jurisdiction "even if the [preemption] defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14 (1983); see also *Caterpillar Inc.*, 482 U.S. at 393. The well-pleaded complaint rule entrusts these potentially dispositive federal law disputes to state courts, consistent with the longstanding presumption that state courts are "competent to resolve federal issues." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988); see also *Moore v. Sims*, 442 U.S. 415, 430 (1979) (noting that this Court has "repeatedly and emphatically rejected" the notion that "state courts [are] not competent to adjudicate federal constitutional claims"); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 n.4 (1981)

("Permitting state courts to entertain federal causes of action facilitates the enforcement of federal rights.").

Federal officer removal under 28 U.S.C. §1442(a)(1) is an exception to the well-pleaded complaint rule, for it applies even where the complaint does not raise any issue of federal law. But the Eighth Circuit's unduly broad interpretation of §1442(a)(1) allows the exception to swallow the rule. The well-pleaded complaint rule prevents "potentially serious federal-state conflicts," *Franchise Tax Bd.*, 463 U.S. at 10, by placing upon state courts the responsibility to adjudicate federal defenses to state law claims. Remarkably, the Eighth Circuit used the basis for respondents' preemption defense—compliance with federal regulation, Pet. App. 17a—as grounds for federal jurisdiction, precisely what the well-pleaded complaint rule prohibits. If being subject to federal regulation and being able to assert a federal preemption defense is sufficient to trigger federal officer removal jurisdiction, then the well-pleaded complaint rule will be substantially undermined.

It is for this reason that the Eighth Circuit's decision upsets the established division of labor between state and federal courts. Rather than limiting federal officer removal to private parties who act on behalf of the national government, as petitioners urge, the Eighth Circuit interpreted §1442(a)(1) to undo much of what settled law has done to preserve state court jurisdiction. Like every other grant of authority to the federal courts, removal jurisdiction implicates "the relation of the general government to the government of the States," *Tennessee v. Davis*, 100 U.S. 257, 260 (1879), and "carries significance for federal-state relations." *Arizona v. Manypenny*, 451 U.S. 232, 239 (1981); see also, *e.g.*, *Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005) (Wilkinson, J.) (observing the "significant federalism concerns implicated by" "removal jurisdiction") (internal quotations omitted). Section 1442(a)(1) thus must be

construed "with the highest regard for" the "equality" between federal authority and the States' power "to make and enforce their own laws." *Colorado v. Symes*, 286 U.S. 510, 518 (1932). The Eighth Circuit's drastic expansion of federal officer removal jurisdiction, which views federal regulation alone as grounds for removal, cannot be reconciled with these principles.

II. The Eighth Circuit's Interpretation Of Section 1442(a)(1) Threatens To Undermine The Enforcement Of State Consumer Protection And Other Laws.

The Eighth Circuit's expansion of federal officer removal jurisdiction, if upheld, will have the adverse practical consequence of making it more difficult to enforce the full range of protections granted by state law. Deceptive trade laws, like the Arkansas law at issue here, are a case in point.

"All fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have enacted at least one statute with broad applicability to most consumer transactions, aimed at preventing consumer deception and abuse in the marketplace." National Consumer Law Center, Unfair & Deceptive Acts & Practices § 1.1, at 1 (2001). These laws are an intended and necessary adjunct to regulatory action under federal law by the FTC. "The federal and state laws were meant to complement each other," and "the FTC urged states to adopt their own little FTC Acts as a way of combining resources to target unfair and deceptive practices at both the local and national levels." Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 16 (2005).

State attorneys general and other state agencies can bring suit to enforce these statutes, National Consumer Law Center, *supra*, § 10.3.4, at 785, and nearly every jurisdiction authorizes private suits as well. *Id.* § 7.2.1, at 537-538. Each year, state attorneys general collectively file thousands of such suits, Pet.

Supp. App. 1a, which together with private actions play a critical role in combating consumer fraud nationwide. See Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 Dick. L. Rev. 373, 374 (1990) (state acts are "important litigation weapons in commercial and consumer disputes").

The Eighth Circuit's interpretation of §1442(a)(1), by permitting removal of state law actions simply because the defendants are subject to extensive federal regulation, threatens the enforcement of state consumer protection and other laws in at least three ways. First, a federal court's construction of state law is not binding on state courts, and removal of state law claims to federal court fosters inconsistent rulings and deprives state courts of the chance to develop state law. Second, federal courts are openly reluctant to develop the contours of state law broadly or to entertain untested legal theories, undercutting consumer and other protections offered by state law. Finally, the Eighth Circuit's decision has already inspired defendants in federally regulated industries to remove to federal court lawsuits raising only state law claims. Even if such cases are later remanded, defendants will have succeeded in bogging down state law litigation in costly and time-consuming collateral matters.

A. Removal Slows The Development Of State Law And Allows For Inconsistent Rulings.

"[N]o matter how reasoned the judgment of [a federal] district court may be" on a question of state law, "it cannot escape being a forecast rather than a determination." *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941). Because a federal court's construction of state law does not bind state courts, federal decisions do not make that body of law any more certain or predictable. The Eighth Circuit's expansive take on

federal officer removal jurisdiction exacerbates this problem by rerouting many more cases from state to federal court.

The need for case-by-case development of state law is particularly acute when it comes to state deceptive trade laws. Like the Federal Trade Commission Act itself, those laws are typically drafted in general terms—"prohibiting all conduct that is 'unfair' or 'deceptive'"—and thereby afford courts "the power to make reasoned choices" on a case-by-case basis. Schwartz & Silverman, 54 U. Kan. L. Rev. at 3; see also *id.* at 15 ("Although these laws take various forms, each broadly prohibits unfair or deceptive acts, as does the FTC Act.").

These laws are general by design. As Congress recognized in passing the FTC Act, because "'it would undertake an endless task' by attempting to provide an exhaustive list of prohibited practices," it was necessary to draft the statutory text in broad terms. *Id.* at 9; see also *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1153-1154, 93 Cal. Rptr. 2d 439, 446 (2000) (noting that legislature used "sweeping language" in state unfair competition law "to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur," and that the law was "intentionally framed in * * * broad, sweeping language * * * to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive") (internal quotations omitted). Practical realities make it "impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited," for "unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery." *Id.* at 1154, 93 Cal. Rptr. 2d at 447 (internal quotations omitted); National Consumer Law Center, *supra*, § 1.1, at 1 ("Legislatures and courts have been careful to guarantee that [unfair or deceptive acts or practices] statutes are broad and flexible, so that they can apply to creative, new forms of abusive business schemes in almost all types of consumer

transactions."). Indeed, "[t]he broad, expansive, developing nature of [these] statues is their unique strength." National Consumer Law Center, *supra*, § 1.1, at 2.

Because "[w]hat constitutes an unfair trade practice is determined on a case-by-case basis," *Tyler v. Rapid Cash, LLC*, 930 So.2d 1135, 1140 (La. App. 2006), the development of consumer fraud law depends critically on the resolution of individual disputes. By expanding the range of cases subject to removal under §1442(a)(1), the Eighth Circuit's rule promises to deprive state courts of numerous opportunities to add depth and clarity to state law. Cf. *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 564-565 (2d Cir. 1978) (abstaining to allow Connecticut courts to resolve unsettled issues under state Unfair Trade Practices Act).

Moreover, because federal court interpretations of state law do not bind state courts, expanding removal jurisdiction increases the likelihood that courts will treat similarly situated parties differently. See *infra* pp. 13-17; cf. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594 (1968) (per curiam) (holding that federal court should abstain in favor of state court resolution because "[s]ound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource"); *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943) (recognizing that allowing federal courts to adjudicate certain state law claims would cause "[d]elay, misunderstanding of local law, and needless federal conflict with the State policy," and citing instances "where [a] federal court has flatly disagreed with the position later taken by a State court as to State law"). "Needless decisions of state law should be avoided [by federal courts] both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383

U.S. 715, 726 (1966) (footnote omitted). Far from assuring parties "a surer-footed reading of" state law, the Eighth Circuit's rule would remove a host of state law claims to federal courts, which do not have the power to render controlling pronouncements of state law.

In short, by permitting defendants to remove cases under §1442(a)(1) when they operate in any of the many spheres covered by "comprehensive" or "detailed" federal regulation, the Eighth Circuit's rule will deprive state courts of the opportunity to develop and clarify state law and will open the door to inconsistent decisionmaking.

B. Federal Courts Are Less Willing To Develop The Contours Of State Law.

The Eighth Circuit's rule also undermines the enforcement of state law because federal courts are less likely to develop the contours of state law to the same extent state courts would do absent removal. "A federal court of appeals is necessarily limited in its ability to speak to questions of state law with any certitude" and "generally must be more conservative in resolving novel issues of state law than the highest state court, since [federal courts] are limited to predicting the proper disposition based on earlier precedents developed under substantially different social and economic conditions." *Falise v. American Tobacco Co.*, 94 F. Supp. 2d 316, 356 (E.D.N.Y. 2000). Federal courts view themselves as "*Erie*-bound to apply state law as it currently exists," not to "change that law or adopt innovative theories of recovery," *Solomon v. Walgreen Co.*, 975 F.2d 1086, 1089 (5th Cir. 1992), for it is not "the function of the federal court to expand the existing scope of state law." 19 Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4507, at 207 (1996). Accordingly, "[f]ederal court is not the place to press innovative theories of state law." *Burton v. R.J. Reynolds Tobacco Co.*,

397 F.3d 906, 913 (10th Cir. 2005) (internal quotations omitted).

This dynamic is illustrated by *Insolia v. Philip Morris Inc.*, 216 F.3d 596 (7th Cir. 2000), where the plaintiffs contended that the cautious approach taken by federal courts when interpreting state law is unfair where a suit is removed to federal court over the plaintiffs' objection: "The plaintiffs say they tried to litigate this in state court, but the tobacco companies—as they generally do in cases like this—removed the case to federal court." *Id.* at 607. The Seventh Circuit recognized that "plaintiffs are in a predicament because state law in this area is stunted by the ability of tobacco companies to remove cases under diversity jurisdiction." *Ibid.* But noting that "[w]hen confronted with a state law question that could go either way, the federal courts usually choose the narrower interpretation that restricts liability," the court concluded that the plaintiffs' "bind" did not "justify the federal courts" recognizing a "new tort claim" under state law. *Ibid.*

Likewise, in *Tritle v. Crown Airways, Inc.*, 928 F.2d 81 (4th Cir. 1990), although the plaintiffs objected that removal of their suit would "preclude the [state] courts from ever reaching [their] question" of state law, the Fourth Circuit adhered to the rule that federal courts must not "surmise or suggest" an expansion of state law that "has not been recognized by that jurisdiction's own courts." *Id.* at 84 (internal quotations omitted); see also *Home Valu, Inc. v. Pep Boys*, 213 F.3d 960, 965 (7th Cir. 2000) (observing, in case removed to federal court, that "[w]here, as in this case, we are faced with two equally plausible interpretations of state law, we generally choose the narrower interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability") (internal quotations omitted).

The Third Circuit's decision in *Werwinski v. Ford Motor Co.*, 286 F.3d 661 (2002), provides an illustration in the context of a consumer fraud action. The plaintiffs in *Werwinski* sued Ford under Pennsylvania's Unfair Trade Practices and Consumer Protection Law on behalf of a putative class for allegedly defective transmission components. *Id.* at 663-664. Defendants removed the suit to federal court on diversity grounds. *Id.* at 664. The district court granted Ford's motion for judgment on the pleadings, and the Third Circuit affirmed.

The court of appeals recognized that the state courts had not yet decided whether the economic loss doctrine—which "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract"—applied in cases of intentional fraud under the Pennsylvania statute. *Id.* at 671, 675 (internal quotations omitted). In deciding to apply the doctrine and deny plaintiffs' claim, the Third Circuit invoked the principle that federal courts should err on the side of caution when interpreting state law: "[I]f we were torn between two competing yet sensible interpretations of Pennsylvania law * * *, we should opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of Pennsylvania decides differently." *Id.* at 680.

Within months, however, Pennsylvania courts rejected the Third Circuit's holding and permitted claims for economic injuries arising from intentional violations of the same statute. See *Zwiercan v. General Motors Corp.*, 2002 WL 31053838, at *7 (Pa. Com. Pl. Sep. 11, 2002) (rejecting *Werwinski*'s "blanket application of the economic loss doctrine," and recognizing that the statute must "be liberally construed to prevent unfair or deceptive practices"); *Oppenheimer v. York Int'l*, 2002 WL 31409949, at *5 (Pa. Com. Pl. Oct. 25, 2002) (adopting "holding contrary to that of the Third Circuit on the role of the economic loss doctrine with respect to" claims under the statute); see also *Seward v. Certo*, 2006 WL 266150, at *2

(E.D. Pa. Feb. 2, 2006) (recognizing that "Pennsylvania courts * * * have expressly disagreed with *Werwinski*'s holding"). The *Werwinski* plaintiffs, forced into federal court against their wishes, thus lost on claims that have since prevailed in the state courts.*

By affording removal jurisdiction to entire industries, so long as they are subject to sufficiently thorough federal regulation, the Eighth Circuit's rule threatens to channel whole classes of state law claims to federal court. Unless this Court disapproves that rule, not only would controlling law fail to develop in these areas, but federal courts, without the benefit of state court rulings on novel claims, would tend to reject state law claims that the state courts themselves would recognize if given the chance.

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* In addition, plaintiffs often are required to satisfy the heightened standard for pleading fraud with particularity under Federal Rule of Civil Procedure 9(b) when pressing claims under state deceptive trade laws in federal court. See, *e.g.*, John R. Knight, *State Law Deceptive & Unfair Trade Practice Claims in Federal Court*, 43 DEC Fed. Law. 10, 11 (1996) ("[I]n the vast majority of reported cases on the subject, fraud-based claims brought in federal court under state deceptive or unfair trade practice statutes have been held subject to the pleading requirements of Rule 9(b)."); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1524 & n.8 (D. Kan. 1995) (holding that "allegations of deceptive trade practices under the [Kansas Consumer Protection Act] are subject to Rule 9(b)'s requirement of particularity," consistent "with other jurisdictions that have held that Rule 9(b) applies to actions under consumer protection acts similar to the KCPA") (citing cases).

C. At Best, The Eighth Circuit's Rule Permits Defendants To Force Plaintiffs Into Wasteful, Collateral Litigation.

Finally, the Eighth Circuit's expansive notion of federal officer removal has prompted defendants in several federally regulated spheres to remove state law suits to federal court. Even when removal is ultimately unsuccessful, it will make litigation substantially more time-consuming and expensive, and will deter plaintiffs from filing suit to vindicate state law rights.

The Eighth Circuit's decision has already caught on, not only among members of the tobacco industry, but in other federally regulated industries as well. See, *e.g.*, *Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838, 850 (S.D. Ill. 2006) (window blinds); *In re Guidant Corp. Implantable Defibrillators Prods. Liability Litig.*, 428 F. Supp. 2d 1014, 1017 (D. Minn. 2006) (medical devices); *Parks v. Guidant Corp.*, 402 F. Supp. 2d 964, 969 (N.D. Ind. 2005) (same); see also *King v. Provident Bank*, 428 F. Supp. 2d 1226 (M.D. Ala. 2006) (citing Eighth Circuit's decision for proposition that removal is available under §1442(a)(1) if defendant acts "pursuant to a comprehensive and detailed regulatory scheme," but holding that regulation of mortgage company and related defendants did not satisfy that standard).

The removal effort may fail, and the federal court ultimately may remand the suit to the state forum. See, *e.g.*, *Alsup*, 435 F. Supp. 2d at 853; *In re Guidant*, 428 F. Supp. 2d at 1018; *Parks*, 402 F. Supp. 2d at 971. But an eventual remand comes only after costly, time-consuming litigation in federal court over the propriety of the initial removal. The Eighth Circuit's approval of §1442(a)(1) removal based upon the FTC's purportedly "comprehensive" and "detailed" regulation of cigarette testing and advertising states a broad standard. Notwithstanding Judge

Gruender's attempts to narrow that standard in his concurrence, Pet. App. 18a-19a, defendants in numerous industries can claim to be subject to federal regulation that is at least as "comprehensive" and "detailed" as the FTC's informal regulation in this case.

With the Eighth Circuit's rule, therefore, federally regulated defendants can credibly threaten, at a minimum, to bog down state lawsuits in collateral federal proceedings. And defendants can do so with little risk to themselves. Although district courts have discretion to assess fees against the defendant who removes unsuccessfully, see 28 U.S.C. §1447(c), the Eighth Circuit's permissive standard gives many federally regulated defendants a good faith basis for attempting to remove. One district court has already relied on the Eighth Circuit's decision as grounds for refusing to award attorneys fees to plaintiffs who successfully fought removal, holding that "[t]he *Watson* case, on which Defendants relied most, gave Defendants a colorable (although ultimately unsuccessful) basis for removal." *Parks*, 402 F. Supp. 2d at 971.

At best, the threat of removal reduces a case's potential value to the plaintiff. At worst, it discourages the plaintiff from filing suit in the first place. Private plaintiffs play an important role in enforcing state consumer protection and other laws, and the threat of private suits is essential to the deterrent effect of these laws. By discouraging such suits, the Eighth Circuit's unduly broad and amorphous removal standard undercuts this deterrent effect.

* * *

The Eighth Circuit's expansive construction of §1442(a)(1) poses significant problems for the enforcement of a range of state laws, including deceptive trade acts like the one at issue here. Allowing removal of lawsuits solely because the defendants are members of industries subject to federal

regulation would deprive state courts of valuable opportunities to develop state law, and federal courts deciding state law claims invariably would reject claims untested in state court. And even if plaintiffs succeed in remanding a suit to state court, they will have spent time and money litigating over removal. The result will be to undermine the development and rigorous enforcement of state law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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LISA WATSON, *ET AL.*,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit, public-interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise principles, individual rights, a limited and accountable government, and the proper use of our state and federal judicial systems. To that end, WLF has appeared before this and other federal courts in cases raising issues of federal court jurisdiction and the removal of federal cases to state courts. *See, e.g., Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145 (2006); *Marshall v. Marshall*, 547 U.S. 293 (2006). In addition, WLF's Legal Studies Division publishes legal policy papers on these topics. A WLF publication of particular relevance to this case is Katharine R. Latimer & Michael L. Junk, *Removing Lawsuits From State Court: The "Federal Officer" Option*, WLF Contemporary Legal Notes (Dec. 2006).

As recognized by the great majority of courts to consider the issue, Congress intended 28 U.S.C. § 1442(a)(1) (the "Federal Officer Statute") to permit removal from state to federal court of any case brought against federal officers or those acting under federal officers, without limitation. Accordingly, WLF files this brief in support of respondents to inform the Court about the historical application of the Federal Officer Statute to corporations acting under federal officers, and to urge the Court not to disturb the consensus of the lower courts that a private corporation today may avail itself of the Federal Officer Statute in those circumstances.

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[1] WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity other than *amicus curiae* and its counsel provided financial support for the preparation and submission of this brief. By blanket letters of consent filed with the Clerk of the Court, all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The "Federal Officer Statute," as amended in 1996, provides that a civil action commenced in state court against any officer of the United States or "*any person* acting under that officer" may be removed "to the district court of the United States for the district and division embracing the place wherein it is pending." 28 U.S.C. § 1442(a)(1) (emphasis added).

Amici curiae Public Citizen, Inc., *et al.* argue that no "non-human" entity other than the United States and its agencies may utilize the Federal Officer Statute. *See* Public Citizen Br. at 7-8 ("[T]he statutory language granting removal rights . . . does not reflect an intent to grant protection to corporations and other artificial entities."); *id.* at 10 ("Nothing . . . reflects a broader intent to alter, let alone expand, the definition of 'person' or to benefit non-human entities other than the United States and its agencies."). In essence, Public Citizen urges this Court to reach an issue never considered by the lower courts in this case,[2] to ignore

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[2] The parties and the courts below never questioned that a private corporation could avail itself of the protections of the Federal Officer Statute. *See* Pet. App. 16a (noting that the parties do not dispute that a corporation can be a "person" acting under a federal officer). Public Citizen's suggestion (*see* Public Citizen Br. at 6-7) that the Court must address this question before affirming the decision below is incorrect. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below."); *Davis v. United States*, 512 U.S. 452, 457 n* (1994) ("Although we will consider arguments raised only in an *amicus* brief, we are reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on which the [relevant federal department] expressly declines to take a position." (internal citation omitted)); *McCleskey v. Zant*, 499 U.S. 467, 523 n.10 (1991) ("It is well established . . . that this Court will not consider an argument advanced by *amicus* when that argument was not raised or passed on

(Footnote cont'd)

decades of jurisprudence, and then to hold that no private corporation – regardless of the circumstances – may ever invoke federal jurisdiction by way of the Federal Officer Statute. Neither law nor logic dictates such a result. WLF respectfully requests that the Court reject Public Citizen's invitation to impose such sweeping and unjustified limitations upon the protections granted by the Federal Officer Statute.

ARGUMENT

I. Corporations Historically Have Availed Themselves Of The Federal Officer Statute.

Public Citizen begins its argument from the premise that "the principle purpose of the removal statute was to protect *individual* federal officers, employees, and agents." Public Citizen Br. at 6. From there, however, Public Citizen broadly and incorrectly states that "[t]he statute's history provides *no support* for the notion that it was intended to protect private corporations." *Id.* at 4 (emphasis added).

Although it may be true that the impetus behind the original Federal Officer Statute was the protection of the rights of individual federal officers, it is untrue that the predecessors to today's Federal Officer Statute served only individuals to the exclusion of private corporations. In *Ward v. Congress Constr. Co.*, 99 F. 598 (7th Cir. 1900), a decision handed down more than a century ago, the Seventh Circuit held that a private construction company was entitled to remove a claim to federal court under the then-existing terms of the Federal Officer Statute. Like today's Federal Officer Statute, the one before the Seventh Circuit in *Ward*

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below and was not advanced in this Court by the party on whose behalf the argument is being raised.").

did not grant the right of removal to corporations by explicit statutory inclusion. Instead, it allowed removal in claims brought against "any officer appointed under or acting by authority of any revenue law of the United States . . . or any *person* acting under or by authority of any such officer." *Id.* at 604 (emphasis added). Even so, in reaching its decision, the Seventh Circuit apparently never doubted that the private corporation in *Ward* could benefit from the removal provisions found in that early Federal Officer Statute.

Other examples may be found, but this one suffices to refute Public Citizen's broad-brush attempt to re-paint the traditional application of the Federal Officer Statutes in order to circumscribe the application of the modern-day statute at issue in this proceeding. For it is clear that private, corporate entities – and not just individuals – historically availed themselves of the protections afforded by the Federal Officer Statute.[3] Certainly this fact could not have escaped the attention of Congress, which has revised the Federal Officer Statute several times throughout the statute's existence in various forms over more than 100 years.

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[3] Petitioners concede that private corporations historically have "avail[ed] themselves" of the federal officer removal statute. *See* Br. for Pet. at 32 ("Some federal courts have held that – unlike private regulated parties – government contractors, in certain circumstances, may avail themselves of the federal officer removal statute." (internal citation omitted) (citing *Ward*, 99 F. 598)).

II. The Overwhelming Majority Of Modern Courts Have Rejected The Arguments Raised By Public Citizen, Holding That Private Corporations Are Indeed "Persons" Within The Meaning Of The Federal Office Removal Statute.

Since the Supreme Court's decision solidifying the government-contractor defense in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), corporate defendants have more often invoked the removal privileges of the Federal Officer Statute. Public Citizen concedes, as it must, that only a handful of modern district court decisions stand for the proposition that a private corporation cannot qualify as a "person" under the terms of the statute. *See* Public Citizen Br. at 6 (noting that "several federal courts have concluded that the statute only applies to natural persons").[4]

The handful of cases cited by Public Citizen were all decided prior to the most recent amendments to 28 U.S.C. §

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[4] Public Citizen cites the following cases: (1) *Krangel v. Crown*, 791 F. Supp. 1436 (S.D. Cal. 1992); (2) *C.H. v. Am. Red Cross*, 684 F. Supp. 1018 (E.D. Mo. 1987); (3) *Roche v. American Red Cross*, 680 F. Supp. 449 (D. Mass. 1988); and (4) *Gensplit Fin. Corp. v. Foreign Credit Ins. Ass'n*, 616 F. Supp. 1504 (E.D. Wis. 1985). *See* Public Citizen Br. at 6. *Krangel v. Crown* provides no authority for the proposition that a private corporation can never qualify as a "person" under the current Federal Officer Statute. Even assuming for the sake of argument that the *Krangel* court properly construed the 1948 version of the Federal Officer Statute at issue in that case, the *Krangel* holding is beside the point, because the 1996 revision of the Federal Officer Statute is at issue here. *See* Section V, *infra*. And, as noted by the district court in *Krangel*, *Roche*, *Gensplit*, and *C.H.* all involved the issue of agency removal; therefore "[n]one of these decisions precisely addresses whether a private corporation is a 'person' under the provision." 791 F. Supp. at 1445.

1442(a)(1)[5] and stand against a veritable tide of contrary authority. No federal circuit court has ever endorsed the view that a corporation may never invoke the Federal Officer Statute. To the contrary, at least the First, Fifth, and Tenth Circuits have held that private corporations can qualify as "persons" acting under a federal officer for purposes of Section 1442(a)(1).[6] In the last ten years, every federal district court squarely to address the issue has likewise held that a private corporation can be a "person" within the meaning of the Federal Officer Statute. In reaching this conclusion, numerous courts have rejected the very same arguments proffered by Public Citizen here.[7] In the instant case,

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[5] *See* Section V, *infra*.

[6] *See Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 468 (1st Cir. 1989) (finding that telephone companies acting under a federal officer could utilize the Federal Officer Statute, and implicitly holding that those companies were "persons" within the terms of the statute); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998) ("[C]orporate entities qualify as 'persons' under § 1442(a)(1)."), *cert. denied*, 526 U.S. 1034 (1999); *Greene v. Citigroup, Inc.*, 215 F.3d 1336 (Table), 2000 WL 647190, at *2 (10th Cir. 2000) ("A private corporation may remove a case under § 1442(a)(1).").

[7] *See, e.g., Ferguson v. Lorillard Tobacco Co.*, No. 1:06CV100006, 2007 WL 539279, at *3 (N.D. Ohio Feb. 15, 2007) (noting that "the overwhelming weight of recent judicial authority supports the view that corporations qualify as 'persons' under the Federal Officer Statute" (citation omitted)); *Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838, 845 n.3 (S.D. Ill. 2006) ("[T]he Court agrees with the weight of authority holding that corporations are persons for purposes of federal officer removal."); *Davidson v. Arch Chems. Specialty Prods., Inc.*, 347 F. Supp. 2d 938, 941 (D. Or. 2004) ("A corporation can be a 'person' for purposes of § 1442(a)(1)."); *Paldrmic v. Altria Corp. Servs., Inc.*, 327 F. Supp. 2d 959, 965 (E.D. Wis. 2004) (disapproving contrary holding by sister court in *Gensplit Fin. Corp. v. Foreign Credit Ins. Ass'n*, 616 F. Supp. 1504 (E.D. Wis. 1985)); *In re Agent Orange Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 447 (E.D.N.Y. 2004) ("Under section

(Footnote cont'd)

none of the real parties in interest disputes that a corporation can be a "person" under the statute. *See* Pet. App. 16a (Eighth Circuit noting that the parties do not dispute that a corporation can be a "person" acting under a federal officer). Even the United States apparently does not dispute that private corporations are "persons" for purposes of the Federal Officer Statute. *See* Br. for the U.S. at 24-25 (relying on cases in which courts applied the Federal Officer Statute to private companies such as telephone companies and banks that "assist[] a federal officer in performing the officer's duties").

Although the numerous lower court decisions noted above – like the concessions of the parties – are not binding on this Court, the near unanimity of the lower courts in holding that corporations are "persons" for purposes of the Federal Officer Statute is

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1442(a)(1) a 'person' includes a corporation."); *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 844 (N.D. W. Va. 2004) ("The majority of courts construing the removal statute . . . have disagreed with the holding in the *Krangel* case and have applied the federal officer removal statute to corporations. . . . Furthermore, courts adopting the majority position have found that including corporations within the definition of 'persons' is consistent with the statutory goal of the federal officer removal statute to prevent state suits from inhibiting federal policy. The majority rule, both as a matter of statutory construction and policy, is persuasive, and the Court concludes that the defendant corporations are 'persons' under 28 U.S.C. § 1442." (citations omitted)); *Arness v. Boeing N. Am., Inc.*, 997 F. Supp. 1268, 1271-72 (C.D. Cal. 1998) (disapproving contrary holding by sister court in *Krangel v. Crown*, 791 F. Supp. 1436 (S.D. Cal. 1992)); *Lopez v. Three Rivers Elec. Co-op.*, 166 F.R.D. 411 (E.D. Mo. 1996) (disapproving contrary holding by sister court in *C.H. v. American Red Cross*, 684 F. Supp. 1018 (E.D. Mo. 1987)); *Good v. Armstrong World Indus., Inc.*, 914 F. Supp. 1125, 1128 (E.D. Pa. 1996) ("I find that Westinghouse qualifies as a person within the meaning of the statute.").

persuasive authority for that proposition.[8] The lower court decisions are particularly persuasive here, where those decisions reflect a careful, reasoned analysis of the issue, worthy of this Court's deference. In *Ryan v. Dow Chem. Co*, 781 F. Supp. 934 (E.D.N.Y. 1992), for example, one of the first decisions to consider (and reject) each of the arguments urged here in support of the theory that corporations cannot be "persons" under the Federal Officer Statute, Judge Weinstein reasoned as follows:

> Determining in a vacuum what the term "person" is meant to encompass seems a fruitless exercise. The statute's use of the word could refer to either natural or legal persons. Legislative history is equally unilluminating. Although as a historical matter it seems plausible to believe that the drafters were concerned with protecting natural persons, there is almost no recorded history for the provision, and none to warrant reliance on such an intuition.
>
> Given the arid interpretive landscape, it would seem more productive to address a slightly different question, namely, what definition of person makes sense in light of the purpose of the section read as a whole. Thus recast, the issue is whether a purely legal person such as a corporation could be engaged in activities that amount to the implementation of a federal policy under the direction of a government officer in such a manner that state court suits

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[8] *Cf. United States v. Craft*, 535 U.S. 274, 300 (2002) (Thomas, J., Scalia, J., and Stevens, J., dissenting) (discussing import of consensus among lower federal courts and stating that "[w]hile the positions of the lower courts and the IRS do not bind this Court, one would be hard pressed to explain why the combined weight of these judicial and administrative sources . . . do not constitute relevant authority").

> against corporations arising out of those activities could be a direct interference with the implementation of federal law.
>
> It is not difficult to imagine such a circumstance.

Id. at 946.

III. Interpreting The Federal Officer Statute To Preclude Removal By Corporations Acting Under Federal Officers Would Both Contradict This Court's Mandate To Apply The Statute Expansively And Produce An Absurd Result.

By now, numerous courts across the country share Judge Weinstein's considered view that corporations may act as "persons" under the Federal Officer Statute.[9] The same logic and the same result should obtain here, for interpreting the word "person" in the Federal Officer Statute to exclude corporations would ignore the sound rationale expressed in the *Ryan* decision and lay down a rule that no corporation, no matter how connected to the federal government or its officers, may remove cases based upon the Federal Officer Statute. Such a holding would impose a sweeping limitation upon the Federal Officer Statute and produce an absurd result, all at the expense of substantial federal interests.

To deny corporations the benefit of Section 1442(a)(1) would be to ignore the reality that the federal government relies on corporations to carry out many of its functions and duties.[10] The

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[9] *See* n.6 and n.7, *supra*, and accompanying text.

[10] As described in the briefs for *Amici Curiae* Defense Contractors and Industry Associations and Blue Cross and Blue Shield Association, the federal government has long contracted with corporations for the provision of numerous products and services. Moreover, the lower courts have long permitted corporations serving in such roles to remove cases to federal court under Section 1442(a)(1).

(Footnote cont'd)

Federal Officer Statute is an essential component of this relationship, bridging the gap between the interests of the federal government and the corporations often charged with carrying out those interests. As the Ninth Circuit pointed out in *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006), "if the federal government can't guarantee its agents access to a federal forum if they are sued or prosecuted, it may have difficulty finding anyone to act on its behalf." For this reason, corporations are, and properly should be, viewed as "persons" under the Federal Officer Statute.

Furthermore, this Court and others have consistently favored a broad interpretation of Section 1442(a)(1) to ensure that all private entities acting pursuant to the federal government's directives are protected from potentially hostile state courts, and further to ensure that the government's interests are not frustrated by state policies inconsistent with federal objectives. *See, e.g., id.* at 1252 (noting the "clear command from both Congress and the Supreme Court that when federal officers and their agents are seeking a federal forum, [courts] are to interpret section 1442 broadly in favor of removal."); *Parks v. Guidant Corp.* 402 F. Supp. 2d 964, 967 (N.D. Ind. 2005) (noting that "[i]f federal officials could not remove such cases to federal court, states could effectively thwart federal action and disrupt the operation of the federal government" (citing *Willingham v. Morgan*, 395 U.S. 402, 406 (1969)).[11] To that end, common sense dictates that where

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See Br. for Def. Contractors and Indus. Ass'ns at 7 (noting that "lower courts are uniform in holding that defense contractors can avail themselves of Section 1442"); Br. for Blue Cross and Blue Shield Ass'n at 9-12 (discussing lower court consensus in allowing private entities right to remove under the Federal Officer Statute).

[11] *See also Jefferson County, Ala. v. Acker*, 527 U.S. 423, 431 (1999) (recognizing that "[i]n construing the colorable federal defense requirement [under Section 1442(a)(1)], we have rejected a 'narrow, grudging interpretation' of the statute . . . ."); *State of Colo. v. Symes*,

(Footnote cont'd)

federal officers themselves are granted access to federal courts by way of the Federal Officer Statute, the same privilege should be granted to the private corporations acting at their direction.

Ultimately, to accept that corporations are "persons" within the meaning of the Federal Officer Statute offends neither the language, nor the intent, nor the historical application of the statute. Instead, to allow corporations acting under federal officers the right to remove claims against them to federal court is consistent with the "broad" application of statute mandated by this

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286 U.S. 510, 517 (1932) (allowing prohibition agent to remove suit under Section 1442(a)(1) and stating "[i]t scarcely need be said that such [removal] measures are to be liberally construed to give full effect to the purposes for which they were enacted"); *Durham*, 445 F.3d at 1252 (this Court "has mandated a generous interpretation of the federal officer removal statute" so that "the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)." (citing *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981) (quoting *Willingham*, 395 U.S. at 407))); *Winters*, 149 F.3d at 398 (acknowledging the "Supreme Court's admonishment that the statute's 'color of federal office' requirement is neither 'limited' nor 'narrow,' but should be afforded a broad reading so as not to frustrate the statute's underlying rationale"); *State of La. v. Sparks*, 978 F.2d 226, 232 (5th Cir. 1992) (noting that "the Supreme Court has for over two decades required a liberal interpretation of § 1442(a) in view of its chief purpose—to prevent federal officers who simply comply with a federal duty from being punished by a state court from doing so" and thereafter adopting "such a liberal interpretation in the instant case"); *In re MTBE Prods. Liab. Litig.*, 342 F. Supp. 2d 147, 154-55 (S.D.N.Y. 2004) (noting that "[a]lthough there is no precise standard for the extent of control necessary to bring an individual with[in] the 'acting under' clause [of Section 1442(a)(1)], a cursory survey of the application of [section 1442(a)(1] reveals it has been construed broadly, and its 'person acting under' provision particularly so" (citing *Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*, 358 F. Supp. 841, 844 (S.D.N.Y. 1973)).

Court's precedents as well as the indisputable fact that federal officers and agencies act not only through individuals but also through private corporations.

IV. This Court's Decision In *Primate Protection* Does Not Dictate That Private Corporations Cannot Be "Persons" Under The Current Federal Officer Statute.

Public Citizen points to this Court's decision in *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991) ("*Primate Protection*"), as if that decision somehow forecloses a determination that private corporations fall within the terms of the Federal Officer Statute. It does not.

Primate Protection does not address the specific question raised here by Public Citizen, *i.e.*, whether private corporations can be "persons" within the meaning of the Federal Officer Statute. Instead, the question confronted by the Court in *Primate Protection* was whether a plain reading of the prior Federal Officer Statute precluded removal by federal "agencies." *See id.* at 79 ("The question before us is whether this provision permits agencies to remove. [T]he starting point in every case involving construction of a statute is the language itself." (quotations and citation omitted)). In essence, the question in *Primate Protection* was a narrow one, readily answered by the unambiguous terms of the then-existing Federal Officer Statute. *See id.* ("We have little trouble concluding that the statutory language excludes agencies from the removal power.").[12] Thus, the Court's conclusion in

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[12] The Court's arguably narrow view of the term "person" in *Primate Protection* was also compelled by the Court's "reluctan[ce] to read 'person' to mean the sovereign," *Primate Protection*, 500 U.S. at 83, an additional consideration that does not limit the Court's interpretation of the same term in this instance.

Primate Protection that the language of the former Federal Officer Statute at one time excluded "agencies" from its provisions does not implicate – much less resolve – the question of whether corporations can or should be included as "persons" under the terms of the current statute. *See, e.g., Krangel*, 791 F. Supp. at 1444 (observing that this Court's decision in *Primate Protection* "was silent as to whether a corporation could remove under the statute"); *Ryan*, 781 F. Supp. at 946 ("The Court did not decide, however, whether a corporation could be a 'person acting under [an officer].'" (quoting *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 142-43 (E.D.N.Y. 1991)).

V. The 1996 Amendments To The Federal Officer Statute, Viewed In Light Of The Pre-Existing Dictionary Act, Confirm That Corporations May Seek The Protections Of The Federal Officer Statute.

To the extent the *Primate Protection* decision has any relevance to the issues currently before the Court, that relevance stems from the impetus provided by that decision for the 1996 amendments to the Federal Officer Statute. With those amendments, Congress effectively overruled the narrow construction given the statute by the Court in *Primate Protection*, thus indicating an intent to bring all entities that act under federal officers within its terms. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 304 F. Supp. 2d at 447 ("Congress's amendment of the statute to emphasize its broad scope supports the conclusion that 'person' encompasses more than mere individuals. Protection of federal government operations in today's organizational climate where so much of our economy and government outsourcing depends upon corporations requires this result. Under section 1442(a)(1) a 'person' includes a corporation.").

The intent of Congress to include corporations as "persons" capable of acting under federal officers is implicit in the 1996 amendments, but nonetheless manifest. Chief among those is the fact that the 1996 amendments to the Federal Officer Statute were

accomplished at a time when the Dictionary Act unambiguously defined the term "person" to include corporations. *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."). Public Citizen argues that "the use of the term 'person' in the federal officer removal statute long predates the first enactment of the Dictionary Act in 1871 and [so the statute] could not possibly have been informed by the Act." Public Citizen Br. at 8, n.2. Although this may be true *chrono*logically, logically Public Citizen's argument misses the mark, for it ignores that the Dictionary Act has remained in place throughout the course of several amendments to the Federal Officer Statute, including the most recent amendment in 1996. Therefore, while the scope of the original statute may not have been informed by the Act itself, the same cannot be said for the subsequent amendments to the statute.[13] Including corporations within the scope of federal officer removal is consistent with the language of the statute as amended in 1996 and as interpreted in light of the pre-existing Dictionary Act. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 782-83 (2000) (reviewing text and history of False Claims Act and finding that its provisions apply to corporations, though not explicitly identified in the statute, "because the presumption with regard to corporations is . . . [that] they are presumptively covered by the term 'person.'" (citing 1 U.S.C. § 1)).

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[13] By its terms, the Dictionary Act supplements and defines each "Act of Congress." 1 U.S.C. § 1. An "Act of Congress" occurs both when a statute is enacted and when a statute is amended. *Cf. Harris v. Allstate Ins. Co.* 300 F.3d 1183, 1189-90 (10th Cir. 2002) (noting in an analogous context that an "Act of Congress" means either the enactment of a statute on "a never-before considered subject or [the] amend[ment of] a previously existing statute").

Ultimately, Public Citizen's reliance on *Primate Protection* is misplaced, and its argument concerning both the relevance of that case and the 1996 amendments to the Federal Officer Statute is a *non sequitur*. Although Public Citizen contends that Congress meant to exclude corporations as "persons" under the statute because its 1996 post-*Primate Protection* amendments did not explicitly bring corporations within the express terms of the statute (*see* Public Citizen Br. at 9-10), the opposite is true. Had Congress intended to exclude corporations from the purview of the Federal Officer Statute in 1996, it could and would have done so. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979) ("[E]valuation of congressional action . . . must take into account its contemporary legal context").In light of the crucial role that corporations play in today's federal government, however, it is not surprising that Congress has not acted to bar corporations from invoking Section 1442(a)(1)'s removal provisions under the proper circumstances. Instead, it is telling that, despite multiple amendments to the Federal Officer Statute, Congress has never endorsed such a limitation.

CONCLUSION

For the foregoing reasons, WLF respectfully requests that the Court reject Public Citizen's invitation to impose sweeping and unjustified limitations upon the Federal Officer Statute that would bar corporations acting under federal officers from utilizing its removal provisions.

Respectfully submitted,

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